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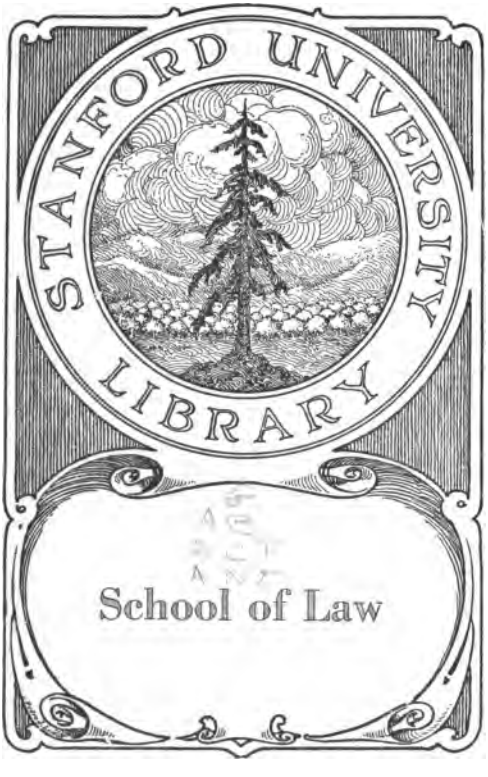
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L^d. Ch. Justice Coke.

THREE

Law Tracts:

I. The Compleat Copyholder; being a Diſcourſe of the Antiquity and Nature of Manors and Copyholds, *&c.*

II. A Reading on 27 *Edward* the Firſt, called the Statute *De Finibus levatis.*

III. A Treatiſe of Bail and Mainprize.

By Sir EDWARD COKE, Knight, Lord Chief Juſtice of the King's Bench.

To which are added,

The Old Tenures; alſo, Some Notes and Additions to LORD COKE's Commentary upon LITTLETON, ſhewing how the Laws are altered ſince thoſe Authors wrote.

By WILLIAM HAWKINS, *Serjeant at Law.*

The whole publiſhed in the *Engliſh* Language.

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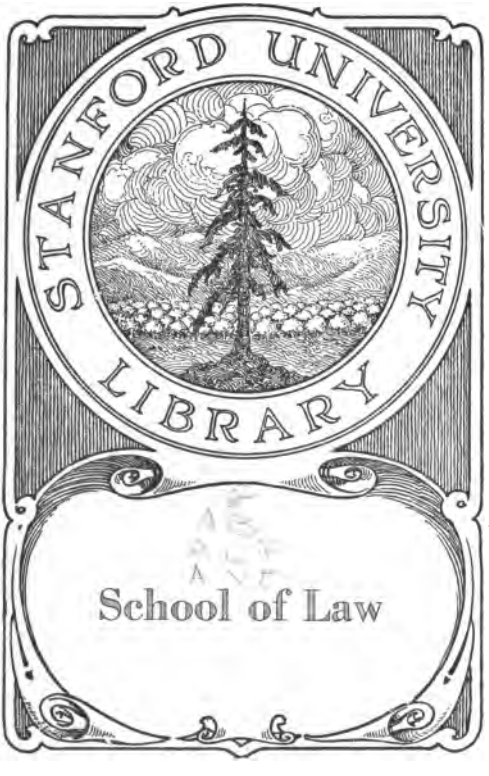
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THE

THE

Complete Copyholder;

BEING

A learned Diſcourſe of the Antiquity and Nature of

Manors and Copyholds,

With all things thereto incident.

By Sir *EDWARD COKE*, Knight.

Whereto is added

A SUPPLEMENT

By way of

ADDITIONS to, and AMPLIFICATIONS of the foregoing Treatiſe.

Both of them neceſſary as well for Lord *as* Tenant.

LONDON:

Printed for J. WORRALL. 1764.

TO THE
READER.

THIS copy coming to my hands, peruſed and reverenced by men learned in the laws, I thought moſt worthy of publication. The very name of the *Compoſer*, who hath been an ornament to our kingdom, is enough to give it ſufficient authority, and endear it to every wiſe opinion. But the profit which doth attend is moſt conſiderable; it being a ſubject ſo material, declaring the antiquity of *Manors* and

and *Copyholds*, and written for the good of *Lords* and *Tenants*, and by conſequence of all men, it cannot but receive a becoming entertainment. In the confidence of this truth, I refer it to all judicious peruſal, not a little congratulating my own happineſs, to have been an inſtrument of bringing ſo excellent a piece from obſcurity, for the benefit of the commonwealth.

W. C.

THE

THE
Compleat Copyholder.

SECTION I.

THOUGH a manor and copyhold have ſuch mutual reſpect and reciprocal reference one to the other, as that they are almoſt in nature of relatives; yet the knowledge of the one cannot be attained unto, unleſs the ſenſe of the other be truly apprehended: for a manor is as the body, and copyholds certain members of this body. In this treatiſe I will diſcourſe of them ſeverally apart, and begin with the *manor* itſelf; eſpecially when common reaſon teacheth us, that * *totum magis illuſtrat partes, quàm partes aliquæ illuſtrant totum.*

SECT. II.

THE *Saxons* (who held *England* in ſubjection immediately before the coming of the *Normans*) were unacquainted with theſe manors, yet in effect they had manors in thoſe days in circumſtance peradventure ſomething varying, in ſubſtance ſurely nothing dif-

* *The whole better illuſtrates the parts, than any of the parts illuſtrate the whole.*

fering from our manors at this day; they wanted neither demeſnes nor ſervices, the two material cauſes of a manor, as * *Fulbeck* termeth them. Their demeſnes they termed **Inlands**, becauſe the lords kept them in their own hands, and enjoyed them in their own poſſeſſion; their ſervices they termed **Utlands**, becauſe thoſe lands were in the manurance and occupation of certain tenants, who, in conſideration of the profits ariſing out of theſe lands, were bound to perform unto their lords certain duties and ſervices. Their demeſnes were of two ſorts, and their ſervices likewiſe were of two ſorts.

SECT. III.

ONE ſort of their demeſnes was termed **Bocland**, becauſe they paſſed by book; and they in effect differed nothing from our freehold lands at this day.

SECT. IV.

THE other ſort of their demeſnes was termed **Folklands**, becauſe they paſſed by polls, and were claimed and challenged by the tenants; not by any aſſurance in writings, but only by the mouth of the people, *per vocem populi*: and they in effect differed in nothing from copyhold lands at this day.

* Fulb. Parat. 4 Dig. p. 18.

SECT.

SECT. V.

TOUCHING their ſervices, one ſort of their ſervices were * *ſervitia libera*, which conſiſted moſt commonly in *Render*, as to pay yearly ſuch a rent; or in *Uſer*, as where the lord reſerved common for his cattel; or in *Prender*, as where the lord reſerved three ſhillings, and four loads of eſtovers for fewel, to be taken yearly in his tenant's grounds.

SECT. VI.

THE other ſort of ſervices were *ſervitia villana*, which conſiſted altogether in feaſance; as to ſcour the lord's ditches, to tile his houſes, to thatch his barns, or ſuch like.

SECT. VII.

AND in the reſervation of theſe ſervices the lords had a ſpecial reſpect unto the quality of the land: did they tranſfer their bocklands, that is, freehold-lands, they would never reſerve villain ſervices; did they tranſfer their folklands, that is, copyhold-lands, they would never reſerve free ſervices; but ſtill they ſuited their ſervices according to the nature of the land. The reaſon I gather was this: In thoſe days none but men of good account and reckoning enjoyed the ſaid bocklands, whereas folklands were in the hands of meaner ſort and condition; and therefore had

* *Free ſervices.*

not the lords care been extraordinary in reſerving apt ſervice, they ſhould have much wronged their tenants. And thus much * *Lambert* verifieth, ſaying, † *Terra ex ſcripto fuit hæreditaria, libera, atque immunis; terra verò ſine ſcripto officiorum quadam ſervitute fuit obligata: priorem plerumque nobiles atque ingenui, poſteriorem verò ruſtici ferè et pagani poſſidebant.* *Lambert* termeth theſe bocklands ‡ *terras liberas atque immunes; non quòd ab omnibus ſervitiis fuerunt liberæ aut immunes, ſed quòd tenentes ipſi fuerunt liberi, et ſervitiis tantùm liberis onerati.* But I much wonder why this bockland doth to this day retain the name of freehold-land, ſithence the time hath bred ſuch an alteration, that in the point of ſervice a man can ſcarce diſcern any difference between Freehold-lands and copyhold-lands. The favourable hand of time hath ſo enfranchiſed theſe copyholders, that whereas in the *Saxons* time their ſervices did conſiſt wholly in feaſance, now they conſiſt in render, in uſer, and in prender: as freeholders ſervices did in thoſe days. And on the other ſide, time hath dealt ſo unfavourably with freeholders, and hath ſo abridged them of their former freedom, that if you compare the ſervice of the freeholders with the ſervice of the copyholders, § *ſenties*

* Gloſſ. at end of Lamb. Αρχαιονομια, p. 222. tit. *terra ex ſcripto.*

† *Land by writing was hereditary, free, and exempt; but land without writing, was liable to the ſervice of ſome offices: the former was moſtly occupied by the nobility and gentry; the latter generally by yeomen, and peaſants.*

‡ *Free and exempt lands; not becauſe they were free, or diſcharged from all ſervices, but becauſe the tenants themſelves were free, and liable only to liberal ſervices.*

§ *You would think the former freer than the latter.*

hunc

hunc potiùs quàm illum fore liberum. How many freeholders are there at this day charged with baſe ſervices? as many (I doubt not) as there are copyholders. No marvel then that many able men turn copyholders, and many peaſants turn freeholders: no marvel, I ſay, that men of all ſorts and conditions, promiſcuouſly, turn both freeholders and copyholders, ſithence there is ſuch ſmall reſpect had unto the quality of the land in the reſervation of our ſervices. Yet obſerve, I pray, though time hath ſo infranchiſed theſe copyholders, that they have in a manner ſhaken off all villain ſervice; yet they retain a badge of their former bondage, for they remain ſtill ſubject to their lord's will; therefore at this day they are termed tenants at will. But with freeholders otherwiſe it is, for they are not in that ſubjection to their lords. Peradventure in this reſpect only bocklands may be termed freehold-lands, and folkland villain-lands: and yet time hath dealt very favourably with copyholders in this point of will, as well as in the point of ſervice.

SECT. VIII.

FOR, as I conjecture, in the *Saxons* time, ſure I am in the *Normans* time, thoſe copyholders were ſo far ſubject to the lord's will, that * *eorum tenentes tempeſtivè et intempeſtive pro voluntate domini poſſent reſumi et revocari*, as

* *Their tenants might be admitted, or refuſed, whether it ſuited them or not, at the will of their lord.*

* Bracton and † *Fleta*, both ſpeak: The lords upon the leaſt occaſion (ſometimes without any colour of reaſon, only upon diſcontentment and malice; ſometimes again upon ſome ſudden fantaſtick humour, only to make evident to the world the height of their power and authority) would expel out of houſe and home their poor copyholders, leaving them helpleſs and remedileſs by any courſe of law, and driving them to ſue by way of petition.

SECT. IX.

BUT now copyholders ſtand upon a ſure ground; now they weigh not their lord's diſpleaſure, they ſhake not at every ſudden blaſt of wind, they eat, drink and ſleep ſecurely; only having a ſpecial care of the main chance, (*viz.*) to perform carefully what duties and ſervices ſoever their tenure doth exact, and cuſtom doth require: then let lord frown, the copyholder cares not, knowing himſelf ſafe, and not within any danger. For if the lord's anger grow to expulſion, the law hath provided ſeveral weapons of remedy; for it is at his election either to ſue a *ſub-pœna*, or an action of treſpaſs againſt the lord. Time has dealt very favourably with copyholders in divers reſpects.

SECT. X.

BUT I perceive myſelf raſhly running into an inextricable labyrinth; I will therefore ſail no longer in theſe unknown coaſts, but

* Bract. lib. 4. tr. 3. cap. 9. No. 5. p. 263.
† Fleta, lib. 5. cap. 5. ſect. 18. p. 289.

will

will haſten homewards; I will content myſelf with this. I know amongſt the *Saxons* the eſſential parts of a manor were known; but whether there then were the ſame form of manors which is at this day, that I dare not examine, for fear of being accounted more curious than judicious, and therefore leaving the *Saxons*, I draw ſomewhat nearer home, and come to the *Normans*, from whom we had the very form of manors which is obſerved amongſt us at this preſent hour.

SECT. XI.

I CONFESS, indeed, that ſithence the original creation of manors, time hath brought in ſome innovations and alterations, as in giving a large freedom unto copyholders both in the nature of their ſervice, and in the manner of their tenure. Yet I may boldly ſay, that the ſelf-ſame form of manors remains unaltered in ſubſtance, though ſomething altered in circumſtance. Demeſne, termed in latine *demanium*, *domanium*, or *dominicum*, is taken in a double ſenſe, *propriè*, and *impropriè*. *Propriè*, for that land which is in the king's own hands: and *Chopinus* ſaith, that * *domanium eſt illud quod conſecratum, unitum, et incorporatum eſt regiæ coronæ*. Take *domanium* in this ſenſe, and then you exclude all common perſons from being ſeiſed *in dominico*: for admit the king paſs over the demeſne lands, as ſoon as they come into a common perſon's hands † *de-*

Chopinus *de domanio, fruct. lib.* 2.

* *Domain is that which is conſecrated, united, and incorporated with the royal crown.*

† *They ceaſe to be domain lands.*

ſinunt eſſe terræ dominicales: for though the king's patentee hath the land granted to him and to his heirs, yet coming from the king, it muſt neceſſarily be holden of the king, but it is contrary to the nature of demeſne lands to be holden of any. Therefore though thoſe lands, which commonly are termed *ancient demeſne, viz.* ſuch lands as were formerly in the hands of *Edward* the *Confeſſor*, may properly be termed generally ancient demeſne, becauſe they were in ancient time in the king's own poſſeſſion; yet to term them at this day the lord's demeſnes, or the tenant's demeſnes, being ſevered from the crown, is improper.

SECT. XII.

THEN by this it appeareth that thoſe lands are termed *improperly* demeſne which are in the hands of an inferior lord, or tenant, nor can ſuch a one in propriety of ſpeech be ſaid to ſtand ſeiſed of any land whatſoever * *in dominico ſuo:* but if you obſerve narrowly the manner of pleadings, the words are uſed in a proper ſenſe, for you ſhall never find that an inferior lord or tenant will plead that he is ſimply ſeiſed * *in dominico*, but ſtill with this addition, *in dominico ſuo* † *ut de feodo*; and that very aptly, for this word *fee* implieth thus much, that his eſtate is not abſolute, but depending upon ſome ſuperior lord. Therefore I conclude, with the *Feudiſts*, that a common perſon may aptly be ſaid to ſtand ſeiſed ‡ *in feodo*, or * *in dominico ſuo ut de feodo*; but improperly *in dominico* ſimply. The king, *è converſo*, may properly be ſaid to ſtand ſeiſed ‡ *in dominico* ſimply;

* *In his demeſne.* † *As a fee.* ‡ *In fee.*

ſimply; but in *feodo* improperly, or *in* ‡ *dominico ſuo ut de feodo.* *Bracton* divideth theſe demeſne lands into two branches. Under the firſt are comprehended thoſe lands which the lord enjoyeth in his own poſſeſſion; under the ſecond, thoſe lands which are in the hands of the inferior copyholders. His words are theſe: **Dominicum dicitur quod quis habet ad menſam ſuam, et idcirco Anglicè vocatur* Bordland: *dicitur etiam dominicum Villenagium, quod traditur villanis, quod quis tempeſtivè et intempeſtivè reſumere poſſit pro voluntate ſua et revocare.* Bract. *lib.* 4. *tract.* 3. *cap.* 9. *numb.* 5. p. 263.

SECT. XIII.

FLETA agreeth with *Bracton* in this diviſion, and unto theſe two he adds more ſorts of demeſne lands. His words are theſe: † *Dominicum eſt multiplex. Eſt autem domini-* Fleta *lib.* 5. *cap.* 5. *ſect.* 18, 19, 20. p. 289.

cum

‡ *As in his demeſne of fee.*

* *That which any one has at his table is ſaid to be domain, and is therefore called in Engliſh,* Bordland. *It is alſo called villan domain, becauſe it is given to villans, which may be (whether convenient, or not) called in, or let out, according to his will.*

† *Domain is manyfold, but it is properly land aſſigned for the table; and villanage that which is given to villains to till, becauſe it may be called in, or let out, (whether convenient, or not) at the will of the lord, in the ſame manner as land in truſt is to be held, as long as is agreeable to the* ceſtui que truſt; *and that alſo may be called domain, of which one has the freehold, another the profits; alſo where one has the freehold, another the charge, as may be ſaid of an ordinary curator and guardian, the former of which is ſo called by law, the latter by man.* Sect. 20. *Domain is likewiſe ſo called in contradiſtinction to that which is held, and in ſervice. Domain is all that tenement of which an anceſtor dies ſeiſed, as of fee; nor does it matter whether it be with the profits,*

or

cum propriè terra ad menſam aſſignata: et villenagium quod traditur villanis ad excolendum, quod tempeſtivè et intempeſtivè pro voluntate domini poterit revocari, ſicut eſt de terra commiſſa tenend. quamdiu commiſſori placuerit. Poterit et dici dominicum de quo quis habet liberum tenementum, alius uſumfruct. et etiam ubi quis habet liberum tenementum, alter curam ſicut de cuſtode dici poterit, et curatore; quorum unus dicitur ab homine, alius in jure. Dominicum etiam dicitur ad differentiam ejus quod tenetur et in ſervitio. Dominicum eſt omne illud tenementum de quo anteceſſor obiit ſeiſitus, ut de feodo nec refert cum uſufructu vel ſine, et de quo ſi ejectus eſſet, ſi juverit, recuperare poſſit per aſſiſam novæ diſſeiſinæ, licet alius haberet uſumfructum; ſicut dici poterit de illis qui tenent in villenagio, qui utuntur et fruuntur, non nomine proprio, ſed nomine domini ſui.

SECT. XIV.

THIS opinion of *Bracton* and *Fleta*, both conſenting in one, that copyhold land is parcel of the lord's demeſnes, wanteth not modern authority to ſecond it: for 15 *Eliz.* in the *Exchequer*, I find it adjudged in the caſe of a common perſon, howſoever it is otherwiſe in the king's caſe, that if the lord of a manor granteth away *omnes terras ſuas dominicales*, the copyholds, parcel of the manor, paſs by theſe general words. Neither doth this want reaſon

or without; and if he be turned out, if he pleaſes, he may recover by aſſiſe of novel diſſeiſin, though another has the profits of it, as may be ſaid of thoſe, who hold in villenage, who uſe and enjoy, not in their own name, but in the name of their lord.

to

to confirm it: for in the time of *Henry* the 3. and *Edw.* the 2. when *Bract.* and *Fleta* lived, copyholders were accounted meer tenants at will, and therefore after a ſort their lands were reputed to continue ſtill in the lord's hands: and now, though cuſtom hath afforded them a ſurer foundation to build upon, yet the frank-tenement at the common law reſting in the lord, it can be no ſtrange thing to place the lands under the rank of the lord's demeſnes. But to deliver my mind more freely in this point, I think that howſoever, according to the ſtrict rules of law, theſe copyholds are parcel of lord's demeſnes; yet in propriety of ſpeech (if propriety can be an impropriety) they are the more aptly called the copyholders demeſnes: for though the frank-tenement be in the lord by the common law, yet by the cuſtom the inheritance abideth in the copyholders; and it is not denied, if a copyholder be impleaded, in making title to his copyhold, he may juſtly plead, * *quòd eſt ſeiſitus in dominico ſuo*, with this addition, † *ſecundùm conſuetud. Manerii.* Therefore I conclude, that howſoever the common law valueth the title of the copyholder, yet he hath ſuch an intereſt confirmed unto him by cuſtom, that the lord having no power to reſume his lands, at your own pleaſure they are (though improperly) called (yet peradventure truly accounted) the lord's demeſnes, and that in the eye of the world; howſoever it be in the eye of the law, that thoſe lands alone can properly challenge

* *That he is ſeiſed in his demeſne.*

† *According to the cuſtom of the manor.*

the

the name of the lord's demeſnes (if any lands in the poſſeſſion of inferior lords may properly challenge that name) which the lord reſerveth in his own hands, for the maintenance of his own board or table; be it his waſte ground, his arable ground, his paſture ground, or his meadow; be it his copyhold which he hath by eſcheat, by forfeiture, or by purchaſe; or be it any part of his freehold land, of which I muſt ſpeak a word by the way, not to prove that it is demeſne, for * *manifeſta probatione non indigent*, but to ſhew you in what ſenſe it is taken, and how far it extendeth.

SECT. XV.

A FREEHOLD is taken in a double ſenſe; either it is named a freehold in reſpect of the ſtate of the land, or in reſpect of the ſtate of the law.

SECT. XVI.

IN reſpect of the ſtate of the land; ſo copyholders may be freeholders: for any that hath any eſtate for his life, or any greater eſtate, in any land whatſoever, may, in this ſenſe, be termed a freeholder.

SECT. XVII.

IN reſpect of the ſtate of the law; and ſo it is oppoſed to copyholders, that what land ſoever is not copyhold is freehold: and in this ſenſe I take it throughout this diſcourſe.

* *What is apparent, ſtands in no need of proof.*

SECT.

SECT. XVIII.

THE name of freeholders extendeth not only unto lands held * *per ſervitium militare*, as it did by the ancient law of *Scots*, amongſt whom freeholders were known by the name of *milites*: but it reacheth likewiſe to lands holden † *per ſervitium Socæ*, whether in †† *libero Socagio*, or in ‖ *Villano Socagio*. *Liberum Socagium* is, where any tenant holds of any lord by paying yearly a certain ſum of money in lieu of tillage, and ſuch like ſervices, and not by eſcuage: and this is termed ſometimes *common ſocage*. Skene *de verb. ſign. tit.* Milit.

‖ *Socagium villanum* is, where the ancient ſervices of carrying the lord's dung into the fields, of plowing his ground at certain days, of plaſhing his hedges, and ſuch, are not turned into money, but remain ſtill unaltered. And if you doubt that ſuch land as is held by ‖ *villanum Socagium* cannot come within the compaſs of freehold land; for your ſatisfaction, read *Bracton*, *lib.* 2. *cap.* 8. *num.* 8. ‡ *Hactenus de primo defunctionis membro: ad ſecundum properemus, et pauca de ſervitiis domino debitis pertractemus.* In *Stat.* 37 H. 8. *cap.* 20. it is ſo called.

Services *in individuo* are manifold, *in ſpecie* threefold: 1. Corporal ſervices, 2. Annual ſervices, 3. Accidental ſervices.

* *By military ſervice.* † *By Socage ſervice.*
†† *Free ſocage.* ‖ *Villan ſocage.*
‡ *Thus much of the firſt part of my duty; let us now haſten to the ſecond, and treat briefly of ſervices due to lords.*

SECT.

SECT. XIX.

SERVICES of *ſubmiſſion* are homage and fealty, which are certain ceremonies uſed among tenants, whereby they ſubmit themſelves unto their lords, and bind themſelves by ſolemn oath, or by faithful promiſe, from that day forward to become the lord's men for life, for member, for terrene honour, or, *ad minimum*, to owe unto him faith, for the lands which they hold of him. Both theſe ceremonies are uſed at the firſt entrance or admittance of ary tenant, and both tend to one end, *viz.* to inforce every tenant to acknowledge and confeſs himſelf tenant unto his immediate lord: yet they differ in many material points.

SECT. XX.

1. IN regard of their ſeveral manner of performance: for in doing fealty, the tenant taketh a ſolemn oath; in doing homage, only giveth his faithful promiſe. And thence it is that fealty is accounted the more ſacred ſervice, though homage be the more humble ſervice, and performed with far greater reverence than fealty in many reſpects. For in doing homage the tenant kneeleth, in doing fealty he ſtandeth; in doing homage the tenant muſt remain uncovered, in doing fealty he may remain covered; in doing homage the lord kiſſeth his tenant, in doing fealty he kiſſeth him not; laſtly, in doing homage the tenant promiſeth to become the lord's man for life, for member, and terrene honour; in doing fealty

fealty he only ſweareth to become the lord's faithful tenant. The reaſon of this difference I learn to be this: Becauſe homage eſpecially concerneth ſervice in war, and properly appertaineth unto knight's ſervice; but fealty chiefly concerneth ſervice at home, and properly appertaineth to ſocage-tenure. And though now 'tis held, that a tenant by ſocage may do homage, and that homage *ex ſe* maketh ſocage-tenure, and not knight's ſervice: yet originally homage was invented for tenants by knight's ſervice, and ſuch as were bound by their tenure to attend their lords in the wars; but fealty was primarily deviſed for tenants in ſocage, and ſuch as were bound by their tenure to manure the lord's ground, and carefully to diſcharge all rural affairs. And this agreeth with the ancient laws in *Scotland*; for amongſt them none were accounted freeholders, but only tenants by knight's ſervice, and conſequently none but they could do homage. And therefore marvel not why in doing homage the tenant promiſeth to become the lord's man for life, for member, for terrene honour; in doing fealty he only ſweareth to become the lord's faithful tenant. Skene *de verb. ſign. in* Homage.

2. They differ in regard of the perſons to whom they are performed, and that two ways. 1. In reſpect none is capable of receiving homage but the lord in perſon; but the lord's ſteward or his bailiff is capable to receive fealty in the lord's behalf. 2. In reſpect that a lord who hath but an eſtate for his life in his ſeigniory cannot receive homage; but ſuch a lord may receive fealty.

3. They

3. They differ in regard of the perſons by whom they are performed, and that two ways. 1. In reſpect that no copyholder is capable of doing homage, but he is of doing fealty; witneſs common experience. 2. In reſpect that a tenant for life or years is unable to do homage; for 'tis a ground in law, that none can do homage but tenant in fee ſimple, or *ad minimum*, tenant in tail.

SECT. XXI.

Brudnet and *Foxley*, 5 *H.* 7. The juſtices of the Common Pleas, 10 *H.* 6. held that leſſee for years cannot do fealty.

BUT a tenant for life or for years are both able to do fealty, according to *Littleton*'s rule, That fealties are incident to every tenure, except tenures in frank-almoigne and tenants at will, contrary to ſome erroneous opinions.

4. They differ in regard that homage can be but once done unto one lord by the ſame tenant; and therefore 'tis agreed, that if lands deſcend unto me which are holden of *J. S.* by homage, and I do unto him homage, and after other lands deſcend unto me by another anceſtor, which is holden of the ſame lord by homage, I ſhall not do homage again, but fealty only, becauſe I cannot twice become the lord's man: but the ſelf-ſame tenant may ſeveral times do fealty unto the ſelf-ſame lord; and therefore if a copyholder ſurrendreth *White-acre* unto me, for his *White-acre* I ſhould do fealty unto the lord; if after another ſurrendereth unto me *Black-acre*, I ſhall do fealty likewiſe unto the ſame lord. And thus much for ſervices of ſubmiſſion.

SECT.

SECT. XXII.

SERVICES of *profits* are of two ſorts. 1. Tending to the public profit of the commonweal; as when the lord enjoineth his tenant to amend highways, to repair decayed bridges, or * *ſimilia*. 2. Tending to the private profit of the lord; as where the tenant is enjoined to be the lord's carver, butler, or brewer, or is tied to pale the lord's parks, to tile the lord's houſes, to thatch the lord's barns, and * *ſimilia*. And thus much for corporal ſervices.

Annual ſervices are in number infinite, in nature all one; for they all tend to the increaſe of the lord's coffers, and are reſerved in their duties, as well for copyhold land as freehold land; though in the *Saxons* time, and long after the conqueſt, they were never or ſeldom reſerved for copyhold land, but only for freehold land. I will not enumerate many particulars of annual ſervices, for that were as endleſs as numbering the ſands of the ſea; only this I ſay, that thoſe annual ſervices which here come within the compaſs of my meaning conſiſt all in render, none in feaſance; for thoſe annual ſervices, as well as accidental ſervices, which conſiſt in feaſance, I comprehend under corporal ſervices.

Thus leaving both corporal ſervices and annual, I bend my courſe towards *accidental* ſervices; which before I begin to particularize, obſerve theſe two things by the way.

* *The like.*

1. That accidental ſervices differ from corporal and annual ſervices in this, that moſt accidental ſervices are incident to the fee, and are due without ſpecial reſervation of the lord; but moſt corporal ſervices and all annual ſervices are due upon ſpecial reſervation, and are not incident unto the fee.

2. That ſervice is taken in a double ſenſe, * *in ſtrictiori ſenſu*, and † *in latiori ſenſu*. In **ſtrictiori ſenſu*; and in that ſenſe the *Feudiſts* define ‡ *ſervitium fore munus obſequii clientelario, &c.* that duty which the tenant oweth unto his lord, either in performing ſome corporal function, or in diſcharging ſome annual payment. † *In latiori ſenſu*, and ſo it ſignifieth any duty whatſoever accruing unto the lord by reaſon of his ſeigniory: and in this ſenſe theſe accidental ſervices following (which *primâ facie* may ſeem better to rank under the title of juriſdictions, or rather under the name of the fruits of a manor) may very fitly be reduced to this kind of ſervices.

The ſervices I aim at, and which I mean to treat of particularly in this place, are theſe following.

1. *Wardſhips.*
2. *Herriots.*
3. *Reliefs.*
4. *Amerciaments.*
5. *Forfeitures.*
6. *Eſcheats.*

Now touching every one of theſe apart, and firſt of *Wardſhips.*

* *In a ſtricter ſenſe.* † *In a larger ſenſe.*
‡ *Service to be a part of ſubmiſſion from the tenant.*

SECT.

SECT. XXIII.

WARDSHIP * *eſt cuſtodia hæredis infra ætatem exiſtentis.* *Polydore Virgil* ſaith that this was † *novi vectigalis genus excogitatum* to help *Hen.* 3. being oppreſſed with much poverty, by reaſon he received the kingdom greatly waſted by wars of his anceſtors; and therefore needing extraordinary help to uphold his eſtate, the uſe of wardſhips was ſet abroach. But the 33. chapter of the grand cuſtomary maketh mention of this to have been uſed among the *Normans* immediately after the erection of manors, and that the uſe of wardſhips was afoot before *Hen.* the third's time; as appeareth manifeſtly by ‡ *Glanvil*, who writeth very largely in many places in his book, and lived in *Hen.* the ſecond's time. Guardians are either termed § *cuſtodes*, or ‖ *curatores*, ** *cuſtodes à lege, curatores ab homine*, as *Fleta* ſpeaketh. The civilians make three ſorts of guardian; 1. †† *Tutor teſtamentarius*, 2. ‡‡ *Tutor à prætore datus*, 3. §§ *Tutor legitimus*. This in every point agreeth with our Common law. So we have *tutorem teſtamentarium*, *viz.* where a man poſſeſſed of certain goods and chattels demiſeth theſe unto his Fleta *lib.* 5. *cap.* 5.

* *Is the cuſtody of an heir being within age.*
† *A ſort of new tax thought on.*
‡ Lib. 7. cap. 9. p. 53.
§ *Ordinaries.* ‖ *Guardians.*
** *Ordinaries by law, Guardians by man.*
†† *A teſtamentary Guardian.*
‡‡ *A Guardian appointed by the prætor.*
§§ *A lawful Guardian.*

child, and withall committeth the care of his child's body and diſpoſition of his ſubſtance unto ſome friend: this committee is * *tutor teſtamentarius*, unto whom belongeth the care and cuſtody of the child's body and the diſpoſition of his ſubſtance, until he accompliſh the full age of fourteen years; and then immediately he ſhall be out of ward for his body, but his goods may be kept longer; for as for them they ſhall remain in the truſtees hands ſo many years as the teſtator appointed by his laſt will and teſtament: for though it be not in the father's power to reſtrain the liberty of his child's body longer than to the age of 14, yet the diſpoſing of his goods he may commit to any for as long time as himſelf ſhall think expedient. So by the ſtatute 32 *H.* 8. *c.* 1. and 34 & 35 *H.* 8. *c.* 5. If a man be ſeiſed of ſocage-lands, not holden of the king *in capite*, he may by his laſt will and teſtament commit the ordering of thoſe lands to what friends ſoever, for as many years as ſhall ſeem moſt convenient, and that friend is * *tutor teſtamentarius*. Otherwiſe it is of lands holden by knight's ſervice; for it is not in any man's power by his laſt will and teſtament to deprive the lord of that duty which †*de jure* belongeth to him: and therefore if a copyholder dieth, his heir under the age of fourteen, in regard that this privilege of appointing the heir a guardian for the copyhold land, until he accompliſh the age of fourteen, † *de jure* appertaineth unto the lord, it ſeemeth that the father cannot prejudice the lord in this kind, by appointing another guardian by

* *A teſtamentary guardian.* † *Of right.*

his

his laſt will and teſtament. * *Hæc de tutore teſtamentario.* 2. We have † *tutorem à prætore datum, viz.* where a man deviſeth goods unto his child, and appointeth him not a guardian, then it is in the ordinarie's hand to commit the ordering of the infant's goods unto ſome truſty friend, unto the age of fourteen; at which time the infant himſelf may chuſe a guardian: for it is a rule in the civil law, ‡ *Invito curatore non datur.* And this committee ‖ *eſt tutor à prætore datus.* Theſe guardians, termed amongſt the civilians § *tutores à prætore dati*, are commonly called guardians ** *pur nurture:* and thus in words we ſomewhat differ, in matter nothing, 3. We have †† *tutorem legitimum, viz.* where the intereſt doth ‡‡ *de jure* belong unto any, without the nomination of a private perſon, or the appointment of any publick officer. And this guardian is twofold; either ‖‖ *legitimus jure naturæ*, or §§ *legitimus jure communi.* ‖‖ *Legitimus jure naturæ*, as where the father or the mother hath the wardſhip of their heirs apparent, be it heir male or female. §§ *Legitimus jure communi:* and that guardian is twofold; either guardian in chivalry, or guardian in ſocage. Guardian in *chivalry* is, where any tenant ſeiſed of land holden by knight's ſervice dieth, his heir-male

* *Thus much concerning a teſtamentary guardian.*
† *A guardian appointed by the prætor.*
‡ *That he cannot be appointed without the conſent of the ordinary.*
‖ *Is the guardian appointed by the prætor.*
§ *Guardians appointed by the prætor.*
** *For nurture.* †† *A lawful guardian.*
‡‡ *Of right.* ‖‖ *Lawful by the law of nature.*
§§ *Lawful by the common law.*

under the age of fourteen and unmarried; then ſhall the lord have the ward both of the lands and body of this heir-male unto the age of 21, becauſe the law intendeth, that before that age the heir is unable to perform knight's ſervice, according to the tenure. But the heir-female ſhall be in ward no longer than to the age of ſixteen, becauſe the heir-female, though ſhe herſelf be unable to perform knight's ſervice, yet at ſixteen ſhe is able to take a huſband, who in her behalf may do knight's ſervice; and therefore at thoſe years ſhe ſhall be out of ward. Nay, ſometimes ſhe ſhall be out of ward before ſixteen. And that is either where ſhe is married at the death of her anceſtor, or where ſhe is any whit above fourteen when her anceſtor dieth: in neither of theſe caſes ſhall ſhe be in ward at all. For though the ſtatute of * *W.* 1. *cap.* 22. giveth unto the lord two years next enſuing the fourteenth; yet that is to be underſtood, where ſhe is under the age of fourteen and unmarried at her anceſtor's death, and not otherwiſe. This, for guardian in chivalry. Guardian in *Socage* is, where any one ſeiſed of ſocage-lands dieth, his heir under the age of fourteen; then the next friend unto the heir, to whom the inheritance cannot deſcend, ſhall have the ward of the heir's body and of his land until the age of fourteen; as if the land deſcendeth unto the heir, by the father's ſide, then the mother, or next couſin of the mother's ſide, ſhall have the ward; and if the land deſcendeth to the heir by the mother's ſide, then

* 3 Edw. c. 22. repealed by 12 Car. 2. c. 24.

the

the father, or next couſin on the father's ſide, ſhall have the ward. To conclude, obſerve this difference between guardian in chivalry and guardian in ſocage: that the one receiveth the commodities of the land to his own uſe, without giving any account; the other only to the uſe of the heir, to whom he ſhall be accountable whenſoever it ſhall pleaſe the heir to call him to account after the age of fourteen.

Thus much concerning wardſhips: a word concerning herriots.

SECT. XXIV.

HERRIOT or *Harriot* cometh of the latin word * *herus*, *dominus*, becauſe it is a duty appropriated to the lord: or it is derived from the *Saxon* word *here*, † *exercitus*, becauſe in the *Saxons* time, when the name of Herriot was firſt known, Herriot ſignified nothing elſe but a tribute given to the lord for his better preparation towards war, as a horſe trapped, or a ſpear, or armour, or a ſword, or ſome ſuch like military weapon: and therefore in this ſenſe, importing a thing appertaining to the war, and being due unto the lord, by reaſon of this ſervice which tenants owe unto their lords in any warlike employments, it may very fitly be derived from hence. This their ‡ herriot among the *Saxons* little differed from our relief at this day, howſoever now they differ § *ex diametro*. But let us exa-

* *Maſter, lord.* † *Army.*

‡ See Gloſſ. at the end of Lamb. Apx. App. p. 218.

§ *Diametrically.*

mine the nature of our herriots at this day, and not ſearch into the nature of their herriots in thoſe days; for that were to examine the nature of reliefs, not herriots. *Britton* thus ſpeaketh: A herriot is a Render made at the death of a tenant to his lord of the beſt beaſt found in the poſſeſſion of the tenant deceaſed, or of ſome other, according to the ordinance and aſſignment of the party deceaſed to the uſe of the lord; which toucheth not the land at all, nor the heir, nor his inheritance, neither hath any compariſon to a relief, for it proceedeth rather of grace and good will than of right, and rather from villains than freemen. To this effect ſpeaketh *Fleta*: † *Herriotum eſt quædam præſtatio ubi tenens, liber vel ſervus, in morte ſua dominum ſuum reſpicit de meliori averio ſuo, vel de ſecundo meliori: quæ quidem præſtatio magis fuit de gratia quàm de jure, et nullam habet comparationem ad relevium, eò quòd hæredi non continget, quia factum anteceſſoris.*

Britton, *cap.* 69.

Fleta, *lib.* 3. *cap.* 18.

This our herriot is twofold; herriot-ſervice, herriot-cuſtom. *Herriot-ſervice* is that herriot which is never due without ſpecial reſervation, and is ſeldom reſerved upon any leſs eſtate than an eſtate of inheritance. *Herriot-cuſtom* is that herriot which is never due upon ſpecial reſervation, but is challenged upon

See Bract. lib. 2. c. 36. No. 9. p. 86.

† *An herriot is a certain render of his beſt, or ſecond beſt beaſt, which belongs to the lord upon the death of the tenant, whether he be a freeman, or villain: which render was rather out of favour, than right, and has no reference to relief, inaſmuch as it does not concern the heir, becauſe it is to be performed by the anceſtor.*

ſome

ſome particular cuſtom, and is uſually paid upon an eſtate for life, and for years, as well as upon an eſtate of inheritance. Touching the original of theſe herriots, doubtleſs they are not of that antiquity which the name doth promiſe: for though among the *Saxons* the name of herriot was known, yet the nature of both theſe herriot-ſervices and herriot-cuſtom was utterly unknown until the coming of the *Normans*, who immediately upon the conqueſt changed the name of the *Saxon-herriot*, and termed it by the name of a *relief*, leaving notwithſtanding ſome difference betwixt them; for where the *Saxons* herriot conſiſted uſually in the payment of ſome military weapon, our relief in thoſe days conſiſted wholly in the payment of a certain ſum of money. And preſently after the *Normans* had thus wholly altered the name, and ſomewhat altered the nature of the *Saxons* herriot, then upon the parcelling of their lands unto inferior tenants, they invented this new kind of ſervice, unknown amongſt the *Saxons*, and termed it by the name of herriot-ſervice. Afterward, upon the infranchiſement and manumiſſion of certain villains, theſe herriot-cuſtoms were given to the lords as a continual future gratulation. So that originally, as *Britton* and *Fleta* well note, they were granted meerly * *ex gratia*; but now time hath effected it that they are challenged † *ex debito*.

Thus much of herriots: a word of relief.

* *Out of favour.* † *As due.*

SECT.

SECT. XXV.

Glanv. *lib.* 7. *cap.* 9.

RELIEF is a certain sum of money which every freeholder payeth unto his lord, being at full age at the death of his anceſtor, which in effect foundeth all one with theſe words of *Glanvil*: * *Hæredes majores ſtatim poſt deceſſum anteceſſorum ſuorum poſſunt ſe tenere in hæreditate ſua, licet domini poſſint feodum ſuum cum hærede in manus ſuas capere: ita tamen moderatè id fieri debet, nè aliquam diſſeiſinam hæredibus faciant; poſſunt enim hæredes, ſi opus fuerit, violentiæ dominorum reſiſtere, dum tamen parati ſunt relivium et alia retro ſervitia eis indè facere.* With this agreeth the definition of *Hotoman*; † *Relivium eſt honorarium quod novus vaſſallus introitus cauſâ patrono largitur, quaſi morte uſuali alius, vel alio quo caſu feodum ceciderit, quod jam à novo ſublevatur.* This relief by the antient civil law was termed ‡ *introitus*; and *Vincentius* termeth it § *præſtationem ſeu*

Hotoman. *comment. de verbo* Feod. *et verbo* Relivium.

* *Heirs when of age, may immediately after the deceaſe of their anceſtor take poſſeſſion of their inheritance, though the lords may keep in their hands their fee together with the heir; but they ought to do it ſo cautiouſly, as not to diſſeiſe the heirs in any wiſe, for the heirs may, if there be occaſion, reſiſt the violence of the lords, provided they are ready to pay them their relief, and to perform other ſervices therefore due to them.*

† *A relief is honorary, which a new vaſſal beſtows on his patron by reaſon of his taking poſſeſſion, the fee falling as it were to another by death which is unavoidable, or ſome other accident, which is now taken up anew.*

‡ *Entrance.*

§ *A render or payment made, for confirming or renewing a poſſeſſion.*

ſolutionem factam pro confirmatione ſeu renovatione poſſeſſionis, and that very aptly: for indeed relief is the key which opens the gate to give the heir free paſſage to the poſſeſſion of his inheritance. *Bracton* giveth this reaſon why it is called a relief, * *Quia hæreditas, quæ jacens fuit per anteceſſoris deceſſum, releviatur in manus hæredis; et propter factam relevationem facienda erit ab hærede quædam præſtatio quæ dicitur relevium.* *Skene* fondly imagineth that it taketh his name † *â relevando*, in another ſenſe; for, ſaith he, relief is given by the tenant or vaſſal being of perfect age, after the expiring of the wardſhip, to the lord of whom he held his land by knight's ſervice, that is by ward and relief; and by payment thereof he relieves, and, as it were, raiſeth up again his lands, after they were fallen down into his ſuperior's hands by reaſon of wardſhip. But theſe words of *Glanvil* will ſerve to convince him of error; ‡ *Tandem verò eodem ad ætatem perveniente, et factâ ei hæreditatis reſtitutione, quietus erit à relivio ratione cuſtodiæ.* This relief is twofold; 1. Relief-ſervice. 2. Relief-cuſtom. *Relief-ſervice* is that which is paid upon the death of any freeholder. *Relief-cuſtom* is that which is paid upon the death, change, or alienation of any freehold, according to the

Bracton, *lib.* 2. *cap.* 36.

Skene *de verb. ſign. tit.* Relief.

Glanvil, *lib.* 9. *cap.* 9.

* *Becauſe the inheritance, which had fell by the death of the anceſtor, is* relieved *into the hands of the heir; and a certain render, called a* relief, *was to be made by the heir, on account of the* relieving.

† *From relieving.*

‡ *But the ſame perſon when of age, and reſtitution of his eſtate being made him, he ſhall be diſcharged from relief, by reaſon of the wardſhip.*

cuſtom

cuſtom of the place; in many places half a year's profit, in many places a whole year's profit. And therefore where *Bracton* ſaith, * *Quòd dat domino relevium qui ſuccedit jure hæreditatis, non autem is qui acquirit*; that is to be taken with this caution, † *niſi illud etiam conſuetudine præſtare debet qui acquirit*; theſe reliefs are paid as well for lands holden in ſocage, as lands holden by knight's ſervice. For lands holden in ſocage in this manner: If a tenant in ſocage die, his heir above the age of fourteen, then ſhall the heir double the rent that his anceſtor was wont to pay to the lord; as if the tenant holdeth of his lord by fealty and five ſhillings, then ſhall the heir double the rent, and ſhall pay ten ſhillings, *viz.* five ſhillings in the name of a relief, over and above the five ſhillings which he payeth for his rent. For lands holden by knight's ſervice in this manner: If a tenant by knight's ſervice dieth, his heir of full 21, if he holdeth by an entire knight's fee, he payeth five pound; if by half a knight's fee, then he payeth fifty ſhillings; if by a quarter of a knight's fee, he payeth 25 ſhillings; and ſo proportionably, whoſo holdeth more, payeth more, and who holdeth leſs, payeth leſs. Yet for the fuller apprehenſion of the quantity of a relief, let us examine what a knight's fee ſignifieth. A knight's fee is ſo much land as in ancient time was accounted a ſufficient living for a knight: but whether this was rated according to the quan-

* *That he who ſucceeds by right of inheritance, gives the lord a relief, but not he who purchaſes.*

† *Unleſs the purchaſer ought to render it alſo by cuſtom.*

tity,

tity, or according to the value, * *Cauſidici certant, et adhuc ſub judice lis eſt.* Some hold according to the quantity, and that, according to the ſeveral computations uſed in ſeveral places, a knight's fee was either more or leſs; as in the dutchy of *Lancaſter* a knight's fee contained four hides of land, every hide four carues of land, every carue four yard-lands, every yard thirty acres; and every knight's fee 1920 acres. According to other computations a knight's fee contained 680. But according to moſt computations a knight's fee contained five hides of land, every hide four yard-lands, every yard land 24 acres: according to which computation a knight's fee contained 480 acres. So that according to ſeveral computations a knight's fee was more or leſs. Others hold that a knight's fee was meaſured according to the quality, not according to the quantity; according to the value, not according to the content. And amongſt theſe ſome hold that land to the value of fifteen pound *per annum* made a knight's fee; and therefore † *Camden* ſaith that, ‡ *Sub* Henrico *tertio quodammodo coacti fuerunt equites fieri quotquot libras quindecim ex annuis terrarum redditibus colligârunt:* and out of *Matthew Paris* he writeth, that § *anno* 1256. *Exit edictum regium,*

* *The lawyers differ, and the diſpute is as yet undetermined.*

† Camd. Brit. by Gibſ. P. ccxlvi. *printed* 1722.

‡ *In Henry the Third's reign, as many as received* 15 l. *from the yearly rents of their lands were in a maner obliged to become knights.*

§ *In the year* 1256 *the king's proclamation iſſued, whereby it*

in any place, but encreaſeth and decreaſeth upon every occaſion; and therefore reaſon requireth, that in theſe days a knight's fee ſhould be meaſured according to the value, not according to the quantity of the land; for, by reaſon of the different value of the land, one may be better able to maintain the dignity of a knight with two hundred acres in ſome place, and of ſome land, than another with four hundred acres of other land. But howſoever it is, whether a knight's fee be rated according to the value, or according to the quantity, let it here reſt.

Now give me leave to examine at what time and by what law it was firſt provided, that for every knight's fee the fourth part of a knight's revenue ſhould be paid in the name of a relief, *viz.* 5 *li*; for every baron's fee, the fourth part of a baron's revenue, *viz.* one hundred marks; for every earl's fee, the fourth part of an earl's revenue, *viz.* one hundred pound. Surely reliefs were paid in this manner before the ſtatute of *Magna Charta:* and that is ſomewhat pregnant by this, that by the very words of that ſtatute this relief is termed * *Antiquum relevium:* and by *Glanvil*, who writ before the making of this ſtatute, this is ſomewhat manifeſt; for he ſpeaketh to this effect; † *Dicitur rationabile relevium alicujus*

Glanvil, *lib.* 9. *cap.* 4. *p.* 71.

* *Antient relief.*

† *Every perſon's relief is called reaſonable, according to the cuſtom of the realm; one hundred ſhillings for one knight's fee; the yearly value of that ſocage for ſocage; but nothing is certainly fixed for a barony, becauſe the chief baronies ſatisfy the lord the king for their reliefs, according to the will and indulgence of the lord the king.*

juxta

juxta conſuetudinem regni, de feodo unius militis centum ſolidos, de ſocagio verò quantum valet cenſus illius ſocagii per annum: de baronia verò nihil certum ſtatutum eſt, quia juxta voluntatem et miſericordiam domini regis ſolent baroniæ capital. de releviis ſuis domino regi ſatisfacere. From whence I gather, that ſtatute of *Magna Charta* was in part an affirmance of the common law, in part an inſtitution of a new law.

Touching relief paid by knights, it was but an affirmance of the common law, becauſe they were certain before the ſtatute. Touching reliefs paid by barons, it was an inſtitution of a new law, becauſe they were before uncertain. And the reaſon why dukes and vicounts are not mentioned in this ſtatute, as well as earls, barons, and knights, is this; becauſe when that ſtatute was made, there was neither duke, marqueſs or vicount in *England*. The firſt duke that ever was in *England* ſince the conqueſt, was the black prince, eldeſt ſon to *Ed.* the 3. The firſt marqueſs that ever was in *England* was *Robert* earl of *Oxford*, created by *R.* 2. And the firſt vicount that ever was in *England*, *dominus de bello monte*, created by *Hen.* 6.

But though at the making of this ſtatute theſe dignities were unknown, yet they are comprehended under the equity of the ſtatute, and according to their ſeveral dignities ſhall pay relief unto the king, a duke two hundred pounds, a marqueſs two hundred marks, and ſo ratably and proportionably. But to conclude, let us compare herriots and reliefs together, and obſerve in what they differ.

1. They differ in this, that a herriot lieth in Prender, and a relief in Render. 2. In this,

that a herriot is paid in the name of a tenant deceaſed; but a relief in the name of an heir who is become tenant. 3. In this, that herriots are paid by copyholders as well as freeholders; but relief by freeholders only. 4. In this, that herriots are ever due upon a ſpecial reſervation, or upon ſome particular cuſtom; but reliefs are incident to the fee, and are due without reſervation or cuſtom, contrary to the opinion of *Vincentinus*, who holdeth a relief * *extrinſecam fore præſtationem, et non ineſſe feodo.*

Thus much touching reliefs: a word touching amerciaments.

SECT. XXVI.

AMERCIAMENT is a pecuniary puniſhment for any offence committed againſt the lord of any manor; or (as ſome more at large define it) it is a certain ſum of money impoſed upon the tenant by the ſteward by oath, and preſentment of the homage, for the breach of any by-law made either for the profit of the whole kingdom, or for the benefit of the little commonwealth amongſt themſelves, or for default of doing ſuit, or for other miſdemeanors puniſhable by the ſame court, infinite in number and quality. And this word Amerciament taketh his name from being in the lord's mercy, to be puniſhed more or leſs at his will and pleaſure; and it differeth from a fine in divers reſpects.

1. In that whoſoever is fined may lawfully be impriſoned, but whoſoever is amerced cannot. 2. In this, that amerciaments are inci-

* *To be an extrinſick render, and not to be in the fee.*

den

dent unto court-barons as well as unto court-leets; and fines are never incident to any court-barons, but to court-leets only, or other courts of record. 3. That amerciaments are incident unto every manor whatsoever; but fines are incident unto some few manors only. The reason of this difference is partly grounded upon the former difference: for since amerciaments are incident unto every court-baron, and court-barons are incident unto every manor; * *sequitur ex consequente*, that unto every manor amerciaments are incident: but *ex adverso*, fines being incident unto court-leets only, and those court-leets being in some few manors only, not in every manor expresly; * *sequitur*, that fines are not incident unto every manor, but unto some few manors only. 4. In this, that amerciaments are afferable † *per pares, per sacramentum proborum et legalium hominum de vicineto, qui, secundum modum delicti, majori vel minori amerciamento delinquentem mulctare possunt*: but fines are never afferable in this kind; for look what fine soever the court imposeth upon the delinquent, that bindeth sufficiently, without farther afferance. Give me but leave to ask two questions. 1. When had this afferance its first conception or creation? 2. How may amerciaments in court-leets be discerned and distinguished from fines imposed in the same court, since they are both pecuniary punishments for offences committed?

* *It follows of course.*

† *By our equals, on the oath of good and lawful men of the neighbourhood, who may mulct the offender more or less in proportion to the offence.*

Touching the firſt queſtion, I think this law of afferance was before the ſtatute of *Magna Charta*; for *Glanvil* thus ſpeaketh of it; * *Eſt autem miſericordia domini regis, quo quis per juramentum legalium hominum de vicineto eatenus amerciandus eſt, nè aliquid de ſuo honorabili contenem. amittat:* and therefore by this appeareth, that this ſtatute of *Magna Charta* was but an affirmance of the common law in this point of afferance. Touching the ſecond queſtion, know that 'tis not in the power of the court to impoſe a fine or an amerciament at their election for any offence committed, but ſtill the quality of the puniſhment muſt neceſſarily ſute with the quality of the offence: from the ſeveral natures of offences committed, ariſe the ſeveral names of puniſhments inflicted. The offences in reſpect of the place are twofold, and in reſpect of the perſons twofold. In reſpect of the place, 1. Offences committed † *extra curiam*, of which the ſteward by no common poſſibility can have cognizance without the preſentment of the homage; and therefore the power of preſenting them, and impoſing puniſhments for them, belongeth unto the jurors of the leet, and not unto the ſteward: and theſe puniſhments thus impoſed are termed *amerciaments*. 2. Offences committed ‡ *in curia*, of which the ſteward can take ſufficient notice, without the helping hand of the homage; and as therefore the puniſhments of

Glanv. *lib* 9. *cap.* 11. *p.* 75.

* *But there is the lord the king's mercy when any one is ſo for amerced by the oath of lawful men of the neighbourhood; that he may not loſe any of his honourable contenement.*

† *Out of court.* ‡ *In court.*

theſe

theſe offences belong unto the ſteward, not unto the jurors: and theſe puniſhments thus impoſed are termed *fines*. Thus in reſpect of the place offences are twofold. In reſpect of the perſon they are likewiſe twofold. 1. Offences committed by private perſons. 2. Offences committed by publick officers and miniſters of the court, in the adminiſtration of their office. Puniſhments impoſed for offences of the former rank are termed *amerciaments*, of the latter rank *fines*; the one afferable *per pares*, the other not. And the reaſon why the ſtatute of *Magna Charta* in this point of afferance extendeth not unto any offences committed in court by private perſons or public officers, neither unto any offences committed *extra curiam*, by public officers in adminiſtration of their office, is this, Becauſe though the words of the ſtatute are generally extending unto all offences whatſoever: yet the intent of the ſtatute-makers was not to make the jurors afferors * *in omnibus delictis mulctandis, ſed in iis tantummodo puniendis quorum certam poſſent habere notitiam et intelligentiam*, as *Fleta* ſpeaketh. And therefore ſince the ſteward hath more certain notice of offences committed *in curia*, by what perſons ſoever, than the jurors have, and can better judge and diſcern of the natures and qualities of offences committed *extra curiam* by public officers than jurors can; therefore ſurely the intent of this ſtatute was, to leave the puniſhment of theſe offences to the diſcretion of the ſteward, and not the afferance of the homage.

Co 8. rep. Greiſley's *caſe*.

* *In all mulctable offences, but in puniſhing theſe only, of which they might have certain knowledge and intelligence.*

Thus much concerning amerciaments: a word concerning forfeitures.

SECT. XXVII.

FORFEITURE cometh of the *French* word *forfait*, *scelus*; *quia scelerum et delictorum perpetratio est forisfacturarum causa et origo.* In our language it signifieth the effect of transgressing, rather than the transgression itself; I mean, it signifieth the penalty for the offence committed, rather than the act itself whereby the offence itself is perpetrated: and it extendeth both unto lands and unto goods; unto lands, both copyhold and freehold.

Touching the causes from whence springeth the forfeiture of copyhold lands, I shall have occasion to speak more liberally in another place; and therefore I will silently pass them over, speaking some few words touching the causes from whence forfeitures of freehold land arise.

The causes are many, amongst the which I have observed, 1. That if any freeholder alieneth his land in Mortmain, he forfeiteth his freehold. 2. If a freeholder ceaseth for the space of two whole years to perform such services, or to pay such rents, as he is tied unto by his tenure, and hath not upon his land sufficient goods or chattels to be distrained, he forfeiteth his freehold. 3. If any freeholder infringeth any condition whereunto he is tied, he forfeiteth his freehold.

Touching the causes from whence grow the forfeitures of goods, they are likewise in number many; and from the several causes of forfeiting

feiting goods ariſe ſeveral names of goods forfeited. 2. If a felon ſtealeth goods, and upon purſuit made waiveth theſe goods, and leaveth them in any part of the manor, and be not attached upon the freſh ſuit of the owner; then are theſe goods forfeited to the lord, and are termed *Waives*. 2. If any beaſts are found wandering in any place, and be proclaimed in three market-towns adjoining, and are not claimed by the owner in a year and a day; then are the beaſts forfeited to the lord who hath ſuch a liberty, and are termed *eſtrays*. 3. If any ſuffer ſhipwreck upon the ſeas, and through the violence of the waves goods are caſt upon the ſhore, and, being ſeiſed by the bailiff, are not claimed within a year and a day after the ſeiſure; then are theſe goods forfeited to the lord who hath that franchiſe, and are termed *wrecks*. 4. If one come to a violent end without the fault of any reaſonable creature, then immediately that thing which is the cauſe of that untimely death becometh forfeited unto the lord; and it is termed * a *Deodand*, as this old verſe teſtifieth, † *Omnia quæ movent ad mortem ſunt Deodanda*: as if a horſe ſtriketh his keeper, and killeth him; or if a man driveth his cart, and ſeeking to redreſs it, falleth, and the cartwheel, running over him, preſſeth him to death; or if one, felling a tree, giveth warning to comers by to look to themſelves, and notwithſtanding warning given, ſome body is ſlain by the fall of the

* *Not much countenanced* in Weſtminſter hall *at this day*. Poſt. Cr. Law, p. 45.

† *Every thing which moves to death is a Deodand.*

tree; the horſe in the firſt caſe, the cart and the horſes in the ſecond caſe, and the tree in the third caſe, are forfeited to the lord as Deodands. Many other ſorts of forfeited goods I might add unto this, but I will forbear to enumerate any more in this kind, and to ſpeak more largely of theſe which I have already enumerated, for three ſpecial reaſons.

1. Becauſe they are duties accruing unto the lord not meerly from the tenants, nor ſolely by the act of the tenants, but moſt commonly from ſtrangers, and by the ſole act of ſtrangers; and therefore I confeſs are not aptly ranked under the name of ſervices. 2. Becauſe a perfect manor may well ſubſiſt without their aſſiſtance, ſince they add nothing to the perfection of the eſſence of a manor. 3. Becauſe they are not incident unto every manor, but unto ſuch manors only as can challenge them either by ſpecial preſcription, or by patent from the king: for primarily and originally theſe forfeitures of goods belonged to the king, for theſe reaſons eſpecially; becauſe what goods ſoever have no certain owner known to challenge intereſt in them, as waives, eſtrays, and wrecks, the property of ſuch goods belongs unto the king * *virtute prærogativæ:* and thus much † *Bracton* intimateth, when he ſaith, ‡ *Sunt alia quædam quæ in*

* *By virtue of his prerogative.*

† Bract. lib. 3. cap. 3. No. 4. p. 120.

‡ *There are ſome other things, which cannot be ſaid to be any body's goods, as wreck of the ſea, &c. and other things which have no owner, as ſtraying animals, and ſuch as belong to the lord the king, by reaſon of his privilege on the ocean.*

nullius

nullius bonis esse dicuntur, sicut wreccum maris, &c. et aliæ res quæ dominum non habent, sicut animalia vagantia, et quæ sunt domini regis propter privilegium marium. The reason why deodands are forfeited to the king is this:

Deodands were originally invented for the pacifying of God's wrath, and the appeasing of God's anger; and these things thus forfeited were, according to the true intendment of the law, to be sold, and money distributed among the poor; and therefore upon whom could the law have better conferred this benefit, or rather imposed this charge, than upon the king, who representeth god's person upon the earth, and who the law presumeth will deal more justly and truly, nay, more liberally and bountifully with the poor in this kind, than any inferior lord, who peradventure out of his uncharitableness, peradventure out of want, will be so far from adding any thing to that which is due, that he will rather unjustly subtract part, or unconscionably detain the whole?

Since therefore these forfeitures of goods neither add to the perfection of a manor, neither are incident unto every manor, to spend any farther time about a subject so superfluous would ill beseem this small treatise, wherein the scope and end I aim at is this, only to present to your view what things soever are necessarily requisite to the essence of every manor, and what services soever are incident unto every manor.

And thus much concerning forfeitures: a word concerning Escheats.

SECT.

SECT. XXVIII.

ESCHEATS cometh of the *French* word *echear*, *excidere*, and are termed *excadentie*, which imports lands fallen into the lord's hand for want of heir general or ſpecial to inherit them. But before the lord enter into an eſcheat in this kind, the homage ought to preſent it, and being preſented, proclamation ought to be made to give notice to the world, that if any man come in and juſtly claim, he ſhall be received: the homage then finding it clear, intitle the lord as to lands eſcheated.

Beſides this ordinary ſort of eſcheat, there is another ſort of eſcheat; and that is, where any freeholder committeth felony, and is attainted, the king ſhall have *annum, diem et vaſtum*; and then it cometh unto the lord as an eſcheat.

Thus much concerning the nature of ſervices in general, and there are ſo many particular ſervices *in individuo*, that I might inſiſt in millions more; but fear of incurring the cenſure of being over-tedious, reſtraineth the forwardneſs of my hand: yet ſince occaſion is ſo favourable to me, I will preſume ſo much upon your patience, as to lay open the ſeveral remedies which the law hath provided for the obtaining of thoſe ſeveral ſervices before mentioned, if perchance they be wrongfully deceived by the tenants; and, for method ſake, I will begin with *corporal* ſervices.

SECT.

SECT. XXIX.

IF any freeholder refuſeth to do homage or fealty, which are corporal ſervices of ſubmiſſion; or to mend highways, repair decayed bridges, or *ſimilia*, which are corporal ſervices tending to the publick profit of the commonweal; or to diſcharge the office of a carver, a butler, a brewer, or ſuch like, or to pale the lord's park, to tile the lord's houſes, or to thatch his barns, or *ſimilia*, which are corporal ſervices tending to the private profit of the lord; if, I ſay, any freeholder refuſeth to do any of theſe ſervices, being bound unto them by his tenure, then may the lord lawfully diſtrain his cattel or his goods, and detain them until ſatisfaction be given by performing ſuch ſervices as the law doth require. And the ſame remedy which the law hath provided for corporal ſervices, is likewiſe provided for *annual ſervices*.

SECT. XXX.

FOR if any freeholder refuſeth to pay any annual rent, or to diſcharge any annual payment, according to his tenure; then may the lord lawfully diſtrain, and, in a replevin brought by the tenant, may avow the diſtreſs, and juſtify the taking. But no action of debt will lie for theſe annual ſervices, no more than for corporal ſervices: for it is a ground in law, that as long as the rent continueth of any eſtate or frank-tenement, no action of debt lieth for the arrearages of the rent, nor for any other ſervice

vice whatſoever. And therefore if a leaſe for life be made reſerving rent, the leſſor cannot maintain an action of debt for the arrearages of the rent as long as the eſtate continueth; but preſently upon the determination of the eſtate an action of debt lieth for the arrearages of the rent incurred before the time of the determination. But what? hath the law provided no other remedy for thoſe annual ſervices than a diſtreſs? Surely no, before ſeiſin none; but after ſeiſin once gained, 'tis at his election, either to diſtrain, or to bring an aſſize.

And thus much touching remedies for corporal and annual ſervices.

SECT. XXXI.

ACCIDENTAL ſervices are gotten by many differing means. 1. By ſeiſure only, as the wardſhip of the heir's body, together with the waives, eſtrays, wrecks, deodands, and ſuch like forfeitures of goods. 2. By the entry only, as the wardſhip of the heir's land, together with lands forfeited to the lord, either upon the breach of ſome condition, or upon an alienation in mortmain. 3. By ſeiſure or diſtreſs, as herriot-ſervices, contrary to the opinion of ſome, who held them gainable by diſtreſs only, and not by ſeiſure. 4. By action, as herriot-cuſtoms; for upon the eloignment of the beſt beaſt, the lord may maintain an action of detinue againſt the heir. 5. By entry or action, as lands forfeited to the lord by the ceſſing of his tenant, or eſcheat accruing unto the lord, either upon the attainder or death

death of his tenant without heir: in the firſt, the lord may enter or maintain a writ of *Ceſſavit*: in the ſecond, the lord may enter or maintain a writ of eſcheat. 6. By diſtreſs or action, as reliefs and amerciaments. For reliefs the lord may diſtrain, or bring an action of debt. Neither doth this any whit impugn the former ground, that as long as the rent doth continue, *&c.* becauſe indeed relief is the fruit and approvement of ſervices, rather than any ſervice. And for amerciaments the lord may either diſtrain or bring an action of debt. Other remedy the law hath provided againſt ſtrangers for detaining of theſe duties from the lord; as to inſiſt in one: If a ſtranger will detain the ward's body or the ward's land from the right lord, a writ *De recto de cuſtodia terræ et hæredis* lieth againſt the ſtranger. But to meddle with ſtrangers were to wander out of the little commonweal; and therefore to keep myſelf within my bounds and limits, I will here conclude touching the two material cauſes of a manor, *viz.* Demeſnes and Services. A word touching the efficient cauſe of a manor, and then I will end the definition of a manor.

The efficient cauſe of a manor is expreſſed in theſe words, *of long continuance:* for indeed time is the mother, or rather the nurſe, of manors; time is the ſoul that giveth life unto every manor, without which a manor decayeth and dieth: for 'tis not the two material cauſes of a manor, but the efficient cauſe, (knitting and uniting together thoſe two material cauſes) that maketh a manor. Hence it is that the king

king himſelf cannot create a perfect manor at this day; for ſuch things as receive their perfection by the continuance of time come not within the compaſs of a king's prerogative: and therefore the king cannot grant freehold to hold by copy, neither can the king create any new cuſtom, nor do any thing that amounteth to the creation of a new cuſtom. And therefore a compoſition made between the king and his tenant, where he hath herriot-cuſtom, to pay 10 l. in lieu thereof every time it falleth, is no binding compoſition: for this amounteth to the creation of a new cuſtom. * *Et hæc omnia et ſimilia ſunt temporum, non regum ſeu principum opera:* which fully verifieth the old ſaying, † *Plus valet vulgaris conſuetudo quàm regalis conceſſio.* This is the ſole cauſe why the king cannot create a perfect manor at this day: and this is the chief cauſe why a common perſon cannot create a perfect manor, but not the ſole cauſe; for there is this cauſe farther, A perfect manor cannot ſubſiſt without a perfect tenure, between very lord and very tenant; but a common perſon cannot create a perfect tenure, and conſequently cannot create a perfect manor. Before the ſtat. of *Quia emptores terrarum*, if any tenant ſeiſed of land in fee ſimple had infeoffed a ſtranger, he might have reſerved what ſervices he thought fit; or had he reſerved no ſervices, yet the law would have implied a perfect tenure between the feoffor and

* *And all theſe and the like are the works of the times, not of kings, or princes.*

† *That a vulgar cuſtom availeth more, than a royal grant.*

the

the feoffee, for the feoffee was to hold of the feoffor by the ſame ſervices that the feoffor held over of his lord paramount: but ſince this ſtatute, if a tenant ſeiſed of land in fee infeoffeth a ſtranger, neither by the expreſs reſervation of the feoffor, nor by the implied reſervation of the law, can there be a perfect tenure created at this day between the feoffor and the feoffee; for the feoffee ſhall hold immediately of the lord paramount, not of the feoffor. And farther, as the king can do nothing which amounteth to the creation of a new cuſtom; ſo a common perſon can do nothing which amounteth to the creation of a new tenure. And therefore if there be lord and tenant by 10 *s.* rent, and the lord will confirm the eſtate of a tenant *Tenend.* by a hawk, a pair of gilt ſpurs, a roſe, or *ſimilia*, this is a void confirmation: otherwiſe had it been if the lord had confirmed the eſtate of the tenant *tenendum per* 5 *s.* that had been a good confirmation, becauſe it tendeth only to the abridgement of an old tenure, and not to the creation of a new. And as it is with a confirmation, ſo it is with a compoſition. Upon the reaſon of this ground it is, that if the lord of a manor purchaſe foreign land, lying without the precincts and bounds of the manor, he cannot annex this unto the manor, though the tenants be willing to do their ſervices; for this amounteth to the creation of a new tenure, which cannot be effected at this day. And therefore if a man having two manors, the lord would willingly have the tenants of both theſe manors to do their ſuit and ſervice to one court, this is but loſt labour in the lord

to practiſe any ſuch union; for notwithſtanding this union they will be ſtill two in nature, howſoever the lord covet to make them one in name; and the one manor hath no warrant to call the tenants to the other manor, but every act done in the one, to puniſh the offenders in the other, is traverſable. Yet if the tenants will voluntarily ſubmit themſelves to ſuch an innovation, and the ſame be continued without contradiction, time may make this union perfect, and of two diſtinct manors in nature make one in name and uſe. And ſuch manors peradventure there are thus united by the conſent of the tenants and continuance of time, but the lords power of itſelf is not ſufficient to make any ſuch union, *cauſâ quâ ſuprà.* But if one manor holdeth of another by way of eſcheat, theſe two manors may be united together, * *fortior enim eſt diſpoſitio legis quam hominis.* But in this, that I exclude common perſons from being able to create a tenure, I may ſeem to impugn many authorities which hold at this day that a tenure may be created by a common perſon. For to clear this colour of contradiction, know that tenures are twofold. Firſt, imperfect: as where a man maketh a leaſe for years or for life, or a gift in tail; here is an imperfect tenure between the leſſor and the leſſee, the donor and the donee; and this imperfect tenure I confeſs may be created by a common perſon at this day. Secondly, perfect, between very lord and very tenant in fee: and ſuch a tenure a common perſon could never create ſince the

* *For a diſpoſition by law, is of more force, than by man.*

ſtatute

ſtatute of *Quia emptores terrarum*. And conſequently a common perſon cannot create a perfect manor ſince, for without a perfect tenure a perfect manor cannot ſubſiſt.

Thus much touching the definition of a manor; thus much, I ſay, touching the two material cauſes, together with the efficient cauſe. A word of another cauſe of a manor, which appeareth not in the definition ſo manifeſtly as the other cauſes do: this is a cauſe which among the logicians is termed *cauſa ſine qua non*, and that is a court-baron; for indeed that is the chief prop and pillar of a manor, which no ſooner faileth, but the manor falleth to the ground. If we labour to ſearch out the antiquity of theſe * court-barons, we ſhall find them as ancient as manors themſelves. For when the ancient kings of this realm, who had all the lands of *England* in demeſne, did confer great quantities of land upon ſome great perſonages, with liberty to parcel the land out to other inferior tenants, reſerving ſuch duties and ſervices as they thought convenient, and to keep courts where they might redreſs miſdemeanors within their precincts, puniſh offences committed by their tenants, and decide and debate controverſies ariſing within their juriſdiction; theſe courts were termed court-barons, becauſe in ancient time ſuch perſonages were called barons, and came to the parliament, and ſat in the upper houſe:

* Gloſſ. at end. Lamb. Αρχ. Tit. *Thanus*, p. 223. Gloſſ. at end *Wilk.* Leg. Angl. Sax. ſame tit. p. 429. 2 vol. of Lord Bac. works, fol. edit. 1753. P. 50. Bac. El. of Law. p. 136. 8vo, edit. 1737.

but when time had wrought ſuch an alteration, that manors fell into the hands of mean men, and ſuch as were far unworthy of ſo high a calling; then it grew to a cuſtom, that none but ſuch as the king would ſhould come to the parliament, ſuch as the king for their extraordinary wiſdom or quality thought good to call by writ, which writ ran, * *hâc vice tantum.* Yet though lords of manors loſt their names of barons, and were deprived of that dignity which was inherent to their names, yet their courts retain ſtill the name of court-barons, becauſe they were originally erected for ſuch perſonages as were barons: neither hath time been ſo injurious as to eradicate the whole memory of their ancient dignity; in their name there is ſtamps left of their nobility, for they are ſtill intitled by the name of *lords*. Theſe courts differ from court-leets in divers reſpects. 1. In this, that court-barons by the law may be kept once every three weeks, or (as ſome think) as often as it ſhall pleaſe the lord; though for the better eaſe both of lords and tenants they are kept but very ſeldom: but a court-leet by the ſtatute of *Magna Charta* is to be kept but twice every year; one time within a month after *Eaſter*, and another time within a month after *Michaelmas*. 2. In this, that court-barons may be kept in any place within the manor, (contrary to the opinion of *Brian*;) but a court-leet by the ſtatute of *Magna Charta* is to be kept in † *in certo loco ac determinato* within the precinct. 3. In this, that originally court-barons belonged

Magna Charta, c. 35. 31 *E.* 3. *cap.* 15.

* *For this turn only.* † *In a certain and fixed place.*

unto

unto inferior lords of manors; but court-leets originally belonged unto the king. 4. In this, that court-barons are incident unto every manor, ſo that every lord of a manor may keep a court baron; but few have leets: for inferior lords of manors cannot keep court-leets without ſpecial preſcription, or ſome ſpecial patent from the king. 5. In this, that in court-barons the ſuitors are judges; but in court-leets the ſteward is judge. 6. In this, that in court-barons the jury conſiſteth oftentimes of leſs than twelve, in court-leets never. The reaſon of that is, becauſe none are impanelled upon the jury in court-barons but freeholders of the ſame manor, but in court-leets ſtrangers are oftentimes impanelled. 7. In this, that court-barons cannot ſubſiſt without two ſuitors *ad minimum*; but court-leets can well ſubſiſt without any ſuitors. 8. In this, that court-barons enquire of no offences committed againſt the king; but court-leets enquire of all offences, under high treaſon, committed againſt the crown and dignity of the king. In many other reſpects they differ: As that a writ of error lieth upon a judgment given in a court-leet, but not in a court-baron. So in a court-leet a *Capias* lieth; but in a court-baron, inſtead of a *Capias*, is uſed an attachment by goods. So in a court-baron an action of debt lieth for the lord himſelf, becauſe the ſuitors are judges; but in a court-leet the lord cannot maintain any action for himſelf, becauſe the ſteward is judge. But omitting theſe with many more, I come to the etymology of a manor. Some derive

the word manor * *à manendo*: and then it taketh his name either from the manor-houſe, which the lord maketh his dwelling-place; or elſe * *à manendo, quia dominus ac tenentes in manerii ſui circuitu cohabitant ac manent.* Some think 'tis termed manor from manuring the ground: and then it taketh its name either from the lord's demeſnes, which the tenants are bound to manure; or elſe from the land remaining in the tenant's hands, which are likewiſe tilled and manured. Others are of opinion that it is derived of the *French* word *meſner*, which ſignifieth to govern or guide, becauſe the lord of a manor hath the guiding and directing of all his tenants within the limits of his juriſdiction. And this I hold the moſt probable etymology, and moſt agreeing with the nature of a manor: for a manor in theſe days ſignifieth the juriſdiction and royalty incorporate, rather than the land or ſite.

Thus much touching the etymology. A word touching the diviſion of a manor. A manor is twofold, 1. ‡ *Re et nomine*; 2. § *Nomine tantum.* ‡ *Re et nomine*, as where the two material cauſes of a manor, the efficient cauſe, and ‖ *cauſa ſine qua non*, do meet and join together. § *Nomine tantùm*, as where any of theſe cauſes is wanting. As to inſiſt in the two material cauſes: If the lord will transfer to ſome ſtranger the ſervices of all his tenants, and reſerve unto himſelf the de-

* *From remaining, becauſe the lord and tenants inhabit and remain within the circuit of the manor.*

‡ *In ſubſtance and name.* § *In name only.*

‖ *The cauſe without which* &c.

meſnes;

meſnes; or if he will paſs away the demeſnes, and reſerve the ſervices; in both caſes the lord peradventure hath a manor * *nomine*, but not otherwiſe, becauſe in the one caſe he wanteth demeſnes, in the other ſervices. So if a manor deſcendeth to copartners, and they make partition, and the entire demeſnes are allotted to the one, and the entire ſervices to the other; the manor is now in ſuſpence, for neither of them hath any manor but in name only; but if part of the demeſnes and part of the ſervices be allotted to each one, then have they each of them a manor, not § *nomine tantùm*, but † *re et nomine*. To inſiſt in the efficient cauſe: If the king at this day will grant a great quantity of land to any ſubject, enjoining him certain duties and ſervices, and withal willeth that this ſhould bear the name of a manor: howſoever this may chance to gain the name of a manor, yet it will not be a manor in the eſtimation of the law. To inſiſt in this cauſe, *ſine qua non*: If the king grant away a manor to *J. S.* excepting the courts and perquiſites, the grantee hath a manor in name only. So if all the freeholders die but one, if the lord purchaſe all the freeholders land, or paſs away the ſervices of the freeholders, or releaſe unto his freeholders all their ſervices; notwithſtanding the demeſnes and the ſervices of the copyholders, yet the lord hath but a manor in name, becauſe the freeholders are wanting, which are the maintainers and upholders of the court-baron, and conſequently a neceſſary help to

* *In name.* § *In name only.*
† *In ſubſtance and name.*

the perfection of a manor. So if the lord granteth away the inheritance of all his copyholders, or demiſeth all his lands granted by copy to another for 2000 years; the grantee in the one caſe, and the leſſee in the other, have a kind of ſeigniority in groſs, and may keep a cuſtomary court, where the ſteward ſhall be judge, and ſhall take ſurrenders, and make admittances: and this in the eye of the world is a manor, though in the judgment of the law it cometh far ſhort of one.

Thus much touching the diviſion of a manor. I might here handle many collateral juriſdictions appropriated to lords of manors; as that of erecting dove-houſes, of proving the wills of their tenants deceaſed within their precincts in many places, of incloſing common, leaving ſufficient beſides for the other commoners, with many the like: * *Sed hæc libens libensque omitto.* And thus cloſing up this part of my treatiſe touching manors, I come to the other part, touching copyhold.

SECT. XXXII.

I NEED not ſtand to diſcourſe at large the antiquity of the *Copyholders*; for if you caſt your eye back to what is paſt, you ſhall eaſily perceive that copyholders, though very meanly deſcended, yet they come of an ancient houſe: and therefore if in this point you deſire ſatisfaction, call to mind what I have already ſpoken, and (if I miſtake not) it will ſufficiently anſwer your deſire. Give me leave

* *But theſe I willingly and freely omit.*

to

to go a ſtep farther, and to examine the ſeveral names which copyholders have had from time to time allotted unto them, together with their proper etymologies. Immediately upon the conqueſt they were known by the name of villains or tenants in villainage: ſo termed by the *Normans*, either in reſpect of the imbecillity and incertainty of their eſtates, which were grounded upon a very weak foundation, wholly depending upon the will of the lord, and ouſtable at his pleaſure; or in reſpect of their ſervices, which ſavoured of nothing but ſlavery, whether they were * *certa ac determinata*, or † *incerta ac indeterminata, ubi ſciri non poterat veſpere, quale ſervitium facere deberent in craſtino*, as *Bracton* ſpeaketh, (contrary to the opinion of ſome, who hold that the ſervice of copyholders was never ſubject to ſuch uncertainties;) or laſtly, in reſpect of the perſons, who for the moſt part were villains, howſoever ſome freemen did ſometimes hold land by the ſame tenure. The leaſt of theſe three reaſons is ſufficient to make them deſerve that name; but join them together, and then he that judgeth moſt favourably of them will think this the trueſt title that could be beſtowed upon them. Yet ſome there are who, in behalf of theſe tenants, ſtick not to maintain (howſoever in reſpect of their eſtates they may not unfitly be termed tenants in villainage, being in ſuch ſtrange ſubjection to their lords) that neither in reſpect of their ſer-

* *Certain and determined.*

† *Uncertain and undetermined, when they were not able to know on the eve, what ſort of ſervice they were to do on the morrow.*

vices nor their perſons they could merit that name; eſpecially if we take the word in that reproachful ſenſe that it is uſually taken in at this hour. But if we account thoſe villain-ſervices which any way touch huſbandry, as Plowing, Sowing, Reaping, and ſuch like; and theſe men villains who exerciſe themſelves in any point of huſbandry; then they agree that their tenure could in no wiſe have an apter term than this: for they confeſs that theſe copyholders were for the moſt part * *ruſtici et pagani*, and their ſervices wholly † *ad ruſticitatem tendentia.* Howſoever I dare not wholly diſallow of this opinion, yet I cannot altogether approve of it. For I admit, and in a manner conſent, that amongſt the *Normans* theſe ſervices, which we call rural ſervices, were called villain ſervices, and thoſe men whom we term huſbandmen were termed villains, and do hold that the copyhold-ſervices in thoſe days were more ſlaviſh than rural, and they themſelves rather bondmen than huſbandmen; otherwiſe we ſhould make their tenure differ in nothing from ancient ſocage-tenure, which I aſſure myſelf is otherwiſe: for though ſocagers were ruſticks, and in that ſenſe villains; yet their tenure was never noted by the name of a tenure in villainage, till in many places their corporal ſervices began to be turned into money: then for diſtinction ſake, the one began to be called ‡ *liberum ſocagium*, the other § *villanium ſocagium.* But long before theſe copyholders were termed villains,

* *Ruſticks and peaſants.* † *Tending to ruſticity.*
‡ *Free ſocage.* § *Villain ſocage.*

and

and therefore without all doubt their tenure was in baſeneſs and ſlavery a degree above the ancient ſocage-tenure; till at length the lords of manors, being framed to more civility, began then to think it a moſt uncharitable part to keep their poor tenants in that bondage: therefore out of the remorſe of their own conſciences, and the compaſſion of their tenants miſeries, by little and little they infranchiſed them, and releaſed them of their heavier burthens, reſerving ſervices of another nature in lieu of them. Thus having ſhaken off the fetters of their bondage, they were preſently freed of their opprobrious name, and had other new gentle ſtiles and titles conferred upon them: they were every where then called *tenants by copy of court-roll*, or *tenants at will* according to the cuſtom of the manor: which ſtiles import unto us three things; 1. *Nomen*, 2. *Originem*, 3. *Titulum*. 1. His name is *tenant by copy of court-roll*; for he is not called tenant by court-roll, but by copy of court-roll: and this is the ſole tenant in law who holdeth by copy of any record, charter, deed, or any other thing. 2. His commencement is at the will of the lord. For theſe tenants in their birth, as well as the cuſtomary tenants upon the borders of *Scotland*, who have the name of tenants, were meer tenants at will: and though they keep the cuſtoms inviolated, yet the lord might, *ſans* controll, eject them. Neither was their eſtate hereditary in the beginning, as appeareth by *Britton*: for if they died, their eſtate was preſently determined; as in caſe of a tenant at will at Common law: and in ſome points, to this preſent hour, the law

Britton, *cap.* 66.

law regardeth them no more than a meer tenant at will; for the freehold at the Common law reſteth not in them, but in their lords, unleſs it be in copyholds of frank-tenure, which are moſt uſual in ancient demeſne. Though ſometimes out of ancient demeſne we ſhall meet with the like ſort of copyholds: as in *Northamptonſhire* there are tenants which hold by copy of court-roll, and have no other evidence, and yet hold not at the will of the lord. Theſe kind of copyholders have the frank-tenure in them, and it is not in their lords, as in caſe of copyholds in baſe tenure. Beſides, copyholders ſhall not attorn upon the granting away of the manor, no more than tenants at will at the Common law; and their eſtate can be no infranchiſement to a villain, no more than a meer eſtate at will. And farther, their lands are parcel of the lord's demeſnes, as well as lands granted away at will, according to the courſe of the Common law: and for his title and aſſurance, that is according to the cuſtom of the manor. For the cuſtom of the manor hath ſo eſtabliſhed and ſo fixed them in their land, that if they do their ſervices and duties, and perform the cuſtoms of the manor, they are as well inheritable, according to the cuſtom, as he that hath a frank-tenement at the Common law. And ſince cuſtom is the life and ſoul of copyhold eſtates, and whatſoever ſhall or can be ſpoken touching copyholds ariſeth from this head and from this fountain; give me leave in the ſecond place to ſpeak ſomething concerning them.

SECT.

SECT. XXXIII.

CUSTOMS are defined to be a law or right not written, which being eſtabliſhed by long uſe and the conſent of our anceſtors; hath been and is daily practiſed.

Cuſtom, preſcription and uſage, how they differ.

Cuſtom, *preſcription* and *uſage*, howſoever there be correſpondency amongſt them, and dependency one on the other, and in common ſpeech one of them is taken for another; yet they are three diſtinct things. Cuſtom and preſcription differ in this, 1. Cuſtom cannot have any commencement ſince the memory of man, but a preſcription may, both by the Common law and the civil: and therefore where the ſtatute 1 *Hen.* 8. *cap.* 4. ſaith, that all actions popular muſt be brought within three years after the offence committed: whoſoever offendeth againſt this ſtatute, and doth eſcape uncalled for three years, he may be juſtly ſaid to preſcribe an immunity againſt any ſuch action. 2. A cuſtom toucheth many men in general; preſcription this or that man in particular: and that is the reaſon why preſcription is perſonal, and is always made in the name of ſome perſon certain, and his anceſtors, or thoſe whoſe eſtate he hath; but a cuſtom, having no perſon certain in whoſe name to preſcribe, is therefore called and alledged after this manner. In ſuch a borough, in ſuch a manor, there is this or that cuſtom. And for uſage, that is the efficient cauſe, or rather the life, of both; for cuſtom and preſcription loſe their being, if uſage fail. Should I go about to make a catalogue of ſeveral

cuſtoms, I ſhould with *Siſyphus* * *ſaxum volvere*, undertake an endleſs piece of work; therefore I will forbear ſince the relation would be an argument of great curioſity, and a taſk of great difficulty. I will only ſet down a brief diſtinction of cuſtoms, and leave the particulars to your own obſervation. Cuſtoms are either general, or particular. General, which are part of the Common law, being current through the whole commonwealth, and uſed in every county and city, every town, and every manor. Particular, which are confined to ſhorter bounds and limits, and have not ſuch choice of fields to walk in as general cuſtoms have. Theſe particular cuſtoms are of two ſorts, either diſallowing what general cuſtoms do allow, or allowing what general cuſtoms do diſallow. As for example ſake, By the general cuſtoms of manors it is in the copyholder's power to ſell to whom he pleaſeth; but by a particular cuſtom uſed in ſome places, the copyholder, before he can enforce his lord to admit any one to his copyhold, is to make a profer to the next of the blood, or to the next of his neighbours † *ab oriente ſolis*, who, giving as much as the party to whom the ſarrender was made, ſhould have it: ſo on the other ſide, by the general cuſtom of manors, the paſſing away of copyhold land by deed for more than for one year without licence is not warranted; yet ſome particular cuſtoms in ſome manors do it. So by the general cuſtoms of manors, preſentments or any other act done in the leet, after the month ex-

* *Roll the ſtone.* † *From ſun riſe.*

pired,

pired, contrary to the ſtatute of *Magna Charta* and 31 *E.* 3. are voids yet by ſome particular cuſtoms ſuch acts are good. And ſo in millions of the like, as in the ſequel of this diſcourſe ſhall be made manifeſt. And therefore, not to inſiſt any longer in dilucidating this point, let us in few words learn the way how to examine the validity of a cuſtom. For our direction in this buſineſs, we ſhall do well to obſerve theſe ſix rules, which will ſerve us for exact trial. 1. Cuſtoms and preſcriptions ought to be reaſonable; and therefore a cuſtom that no tenant of the manor ſhall put in his cattel to uſe his common * *in campis ſeminatis*, after the corn ſevered, until the lord have put in his cattel, is a void cuſtom, becauſe unreaſonable: for peradventure the lord will never put in his cattel, and then the tenants ſhall loſe their profits. So if the lord will preſcribe that he hath ſuch a cuſtom within his manor, that if any man's beaſts be taken by him upon his demeſnes damage-feaſant, that he may detain them until the owners of the beaſts give him ſuch recompence for his harms as he himſelf ſhall requeſt; this is an unreaſonable cuſtom, for no man ought to be his own judge. 2. Cuſtoms and preſcriptions ought to be according to common right: and therefore if the lord will preſcribe to have of every copyholder belonging to his manor, for every court he keepeth, a certain ſum of money, this is a void preſcription, becauſe it is not according to common right; for he ought for juſtice ſake to do it *gratis*. But if the lord

* *In the ſown fields.*

pre-

preſcribe to have a certain fee of his tenants for keeping an extraordinary court, which is purchaſed only for the benefit of ſome particular tenants, to take up their copyholds and ſuch like: this is a good preſcription, and according to common right. 3. They ought to be upon good conſideration, and therefore if the lord will preſcribe, that whoſoever paſſeth through the king's highway which lieth through his manor ſhould pay him a penny for paſſing; this preſcription is void, becauſe it is not upon a good conſideration. But if he will preſcribe to have a penny of every one that paſſeth over ſuch a bridge within his manor, which bridge the lord doth uſe to repair; this is a good preſcription, and upon a good conſideration. So if the lord will preſcribe to have a fine at the marriage of his copyholder, in which manor the cuſtom doth admit the huſband to be tenant by the curteſy, or the feme tenant in dower of a copyhold; this preſcription is good, and upon a good conſideration. But in ſuch manors where theſe eſtates are not allowed, the law is otherwiſe. 4. They ought to be compulſory: and therefore if the lord will preſcribe that every copyholder ought to give him ſo much every month to bear his charges in time of war, this preſcription is void. But to preſcribe they ought to pay ſo much money for that purpoſe, is a good preſcription. For a payment is compulſory, but a gift is arbitrary, at the voluntary liberty of the giver. 5. They ought to be certain: and therefore if the lord will preſcribe, that whenſoever any of his copyholders die without heir, that then another of the copyholders

ſhall

ſhall hold the ſame lands for the year following; this preſcription is void, for the incertainty. But if the lord will preſcribe to have of his copyholders 2 *d.* an acre rent, and in time of war four pence an acre; this preſcription is certain enough. 6. They ought to be beneficial to them that alledge the preſcription; and therefore if the lord preſcribeth that the cuſtom hath always been within the manor, that what diſtreſs ſoever is taken within his manor for any common perſon's cauſe is to be impounded for a certain time within his pound; this is no good preſcription, for the lord is hereby to receive a charge, and no commodity. But if the preſcription goeth farther, that the lord ſhould have for every beaſt ſo impounded a certain ſum of money, this is a good preſcription. If we deſire to be more fully ſatisfied in the general knowledge of preſcriptions and cuſtoms, we ſhall find many maxims which make very materially for this purpoſe; amongſt which I have made choice of theſe three, as moſt worthy of your obſervation. 1. Things gained by matter of record only cannot be challenged by preſcription; and therefore no lord of a manor can preſcribe to have felons goods, fugitives goods, deodands, and ſuch like; becauſe they cannot be forfeited until it appear of record: but waives, eſtrays, wrecks, and ſuch like, may be challenged by preſcription, becauſe they are gained by uſage without matter of record. 2. A cuſtom never extendeth to a thing newly created: and therefore if a rent be granted out of gavel-kind land, or land in borough *Engliſh*, the rent ſhall deſcend according to the courſe

courſe of the Common law, not according to the cuſtom. If before the ſtatute 32 *Hen.* 8. lands were deviſeable in any borough or city by ſpecial cuſtom, a rent granted out of theſe lands was not deviſeable by the ſame cuſtom: for what things ſoever have their beginning ſince the memory of man, cuſtom maintains not. If there be a cuſtom within a manor, that for every houſe or cottage two ſhillings fine ſhould be paid; if any tenant within theſe liberties maketh two houſes of one, or buildeth a new houſe, he ſhall not pay a fine for any of theſe new houſes; for the cuſtom only extendeth to the old. So if I have eſtovers appendant to my houſe, and I build a new houſe, I ſhall not have eſtovers for this new built houſe upon this ground. It hath been doubted, if a man by preſcription hath courſe of water to his fulling-mills, he converting theſe into corn-mills, whether by this converſion the preſcription is not deſtroyed, in regard that theſe corn-mills are things newly created: but becauſe the quality of the thing, and not the ſubſtance, is altered, therefore this alteration is held inſufficient to overthrow the preſcription. For if a man by preſcription hath eſtovers to his houſe, although he alter the rooms and chambers in the houſe, as by making a parlour where there was a hall, *vel è converſo*, yet the preſcription ſtands ſtill in force: and ſo if by preſcription I have an ancient window to my hall, and I convert it into a parlour, yet my neighbours upon this change cannot ſtop my window, * *cauſâ quâ ſuprà.*

* *For the reaſon above.*

3. Cuſtoms

3. Cuſtoms are likewiſe taken ſtrictly, though not always literally. There is a cuſtom in *London*, that citizens and freemen may deviſe in mortmain: A citizen that is a foreigner cannot deviſe by this cuſtom. An infant by the cuſtom of gavel-kind, at the age of fifteen, may make a feoffment: yet he cannot by the cuſtom make a will at that age to paſs away his land, to make a leaſe and a releaſe, which amounteth to a feoffment. If there be any cuſtom that copyhold-lands may be leaſed by the lord, * *vel per ſuperviſorem, vel deputatum ſuperviſoris*, this cuſtom gives not power to the lord to authorize any by his laſt will and teſtament to keep a court in their own name, and to make leaſes † *ſecundùm conſuetudinem manerii*. But theſe cuſtoms have this ſtrict conſtruction, becauſe they tend to the derogation of the Common law; yet they are not to be confined to literal interpretation: for if there be a cuſtom within any manor, that copyhold-lands may be granted ‡ *in feodo ſimplici*, by the ſame cuſtom they are grantable to one and the heirs of his body, for life, for years, or any other eſtate whatſoever; becauſe, § *Cui licet quod majus, non debet quod minus eſt non licere.* So if there be a cuſtom that copyhold-lands may be granted for life; by the ſame cuſtom they may be granted *durante viduitate*, but not *è converſo*; becauſe an eſtate during widowhood is leſs than an eſtate for life. Before the ſtatute of 32 *Hen.* 8. *cap.* 1. lands in

* *Or by a ſuperviſor, or the deputy of a ſuperviſor.*
† *According to the cuſtom of the manor.*
‡ *In fee ſimple.* § *He who may do the greater, ought not be hindered from doing the leſs.*

certain boroughs were deviſeable by cuſtom. By the ſame cuſtom was implicitly warranted, authorizing executors to ſell lands deviſeable. Now with your patience I will only point at the manner of pleading of cuſtoms. I find a four-fold kind of preſcribing.

1. To preſcribe in his predeceſſors as in himſelf, and all thoſe whoſe eſtate he hath.

2. To preſcribe generally, not tying his preſcription to place or perſon: as where a chief juſtice preſcribeth, that it has been uſed that every chief juſtice may grant offices; or where a ſergeant preſcribeth, * *Quòd talis habetur conſuetudo*, that ſergeants ought to be impleaded by original writ, and not by bill.

3. To preſcribe in a place certain.

4. To preſcribe in the place of another.

The firſt ſort of theſe preſcriptions a copyholder cannot uſe, in regard of the imbecillity of his eſtate: for no man can preſcribe in that manner but only tenants in fee ſimple at the Common law.

The ſecond ſort of theſe may be uſed ſometimes by copyholders in the pleading of a general cuſtom; but in alledging of a particular cuſtom a copyholder is driven to one of the laſt, and, as occaſion ſerveth, he uſeth ſometimes the one, ſometimes the other. If he be to claim common or other profit in the ſoil of the lord, then he cannot preſcribe in the name of the lord; for the lord cannot preſcribe to have common or other profit in his own ſoil: but then the copyholder muſt of neceſſity preſcribe in a place certain, and al-

* *That there is ſuch a cuſtom.*

ledge

ledge that within ſuch a manor there is ſuch a cuſtom, that all the tenants within that manor have uſed to have common in ſuch a place, parcel of the manor. But if he be to claim common or other profit in the ſoil of a ſtranger, then he ought to preſcribe in the name of his lord, ſaying that the lord of the manor, and all his anceſtors, and all thoſe whoſe eſtate he hath, were wont to have a common in ſuch a place for himſelf and his tenants at will, *&c.*

SECT. XXXIV.

THUS much of cuſtoms: I come now home to copyholders. And in the third place I hold it the beſt courſe to dilate upon the manner and means of granting copyholds; wherein I will only rely upon theſe five parts.

1. Upon the perſon of the grantor.
2. Upon the perſon of the grantee.
3. Upon the grant itſelf.
4. Upon the thing granted.
5. Upon the inſtruments through whoſe hands, as through conduit-pipes, the lands are *gradatim* conveyed to the purchaſer.

And firſt of the perſon of the grantor. Sometimes the lord himſelf is grantor, ſometimes a copyholder. In voluntary grants made by the lord himſelf the law neither reſpecteth the quality of his perſon, nor the quantity of his eſtate: For be he an infant, and ſo through the tenderneſs of his age inſufficient to diſpoſe of any land at the Common law; or *non compos mentis*, an idiot, or a lunatick, and ſo for want of common reaſon unable to traffick in the world; or an out-law in any perſonal ac-

tion, and ſo excluded from the protection of the law; or an excommunicate, *&c.* and ſo reſtrained * *ab omnium fidelium communione*, or at leaſt † *à ſacramentorum participatione*: notwithſtanding theſe infirmities and diſabilities, yet he is capable enough to make a voluntary grant by copy. For if a feme ſeignoreſs take baron, and they two join in a voluntary grant by copy, this ſhall ever bind the feme and her heirs, and yet ſhe is not *ſui juris*, but § *ſub poteſtate viri*; becauſe the cuſtom of the manor is the chief *baſis* upon which ſtands the whole fabrick of the copyhold eſtate. And therefore what cuſtom doth confirm to a copyholder, the law will ever allow, and never ſeek to avoid it in reſpect of any ſuch imperfection in the grantors perſons; and the quality of the lord's eſtate is no more reſpected than the quality of his perſon: for if his intereſt be lawful, be his eſtate never ſo great or never ſo little, 'tis not material: for be it in fee, or be it in tail or dower, or as tenant by curteſie, for life or for years, as guardian, or as tenant by ſtatute, or as tenant by *elegit*, or at will; the leaſt of theſe eſtates is a ſufficient warrant to the lord to grant any copyhold eſcheated unto him, for as long time as the cuſtom doth allow, the ancient rents and ſervices being truly reſerved: and theſe grants ſhall ever bind them that have the inheritance of frank-tenement of the manor, as well as offices granted for life by the chief juſtice of

* *From the communion of all faithful people.*
† *From partaking the ſacrament.*
§ *Under her huſband's power.*

the

the common pleas, whoſe office is but at will, ſhall ever conclude the ſucceeding juſtice. The reaſon of the law is this. A copyholder upon voluntary grants made by copy doth not derive his eſtate out of the lord's eſtate only, for then the copyholder's eſtate ſhould ceaſe when the lord's intereſt determineth; * *Nam ceſſante primitivo, ceſſat derivativus:* but the life of the copyholder's eſtate is the cuſtom of the manor: and therefore whatſoever befalleth the lord's intereſt in his manor, be it determined by the courſe of time, by death, by forfeiture, or other means; yet if the lord were † *legitimus dominus pro tempore*, how ſmall ſoever his eſtate was, that is enough; for the ſame cuſtom that fixeth a copyholder inſtantly in his land upon his admittance, will likewiſe preſerve and protect his intereſt to the end in ſuch manner, that though the lord's intereſt faileth, yet his ſhall never fall to the ground, being upheld by ſuch a prop, ſuch a pillar; unleſs perchance the copyholder offer violence to his founder, in breaking the cuſtom. If the lord granteth a copyhold, and after doth ſever this copyhold from the manor, by granting the inheritance to a ſtranger, though now one of the chief pillars of a copyhold eſtate is wanting, *viz.* to be parcel of the manor; yet becauſe the land at the time of the copyholder's admittance had this neceſſary incident, this ſeverance, being a matter *ex poſt facto*, cannot amount to the de-

* *For the primitive ceaſing, the derivative ceaſes of courſe.*

† *Lawful lord for the time.*

ſtruction of the copyhold, eſpecially being the ſole act of the lord himſelf. If a manor be granted upon condition, and before the condition is broken the land is granted by copy, then the manor becomes forfeited, and the feoffor entreth; yet the copyhold eſtate remaineth untouched, becauſe lawfully eſtabliſhed by cuſtom: and yet all mean eſtates and charges whatſoever granted by the feoffee at the Common law were voidable upon the entry of the feoffor, for we have a ground in law, that when an entry is made for breach of a condition, the party to all intents and purpoſes is in the ſame plight that he was in at the time of the making of the eſtate. If a man ſeiſed of a manor in fee dieth ſeiſed, having iſſue a daughter, and, his wife being *privement inſeint* with a ſon, the daughter granteth lands by copy; this grant ſhall ſtand good againſt the ſon, for the daughter was *legitima domina pro tempore*. So if the feoffee of a manor, upon condition to infeoff a ſtranger the next day, maketh a voluntary grant by copy; this ſhall bind, and yet his intereſt was to have but ſmall continuance. If a manor be granted with a feme in frank-marriage, and there is a divorce had * *cauſâ præcontractûs*, ſo that now the intereſt of the manor is granted to the feme only, and by relation the marriage is void *ab initio*: yet becauſe the baron was † *legitimus dominus pro tempore*, any copyholders eſtates granted before the divorce remain good. So if a man eſpouſeth a feme

* *By reaſon of a præcontract.*
† *Lawful lord for the time.*

ſeigno-

ſeignoreſs under the age of conſent, and after ſhe doth diſagree; though the marriage by relation was void *ab initio*, yet copyholds granted before diſagreement ſhall never be avoided, *cauſâ quâ ſuprà*.

If the lord of a manor committeth felony or murder, and proceſs of outlawry be awarded againſt him, after the exigent he granteth copyhold eſtates, according to the cuſtom, and then is attainted; theſe grants are authentical, though by relation the manor was forfeited from the time of the exigent awarded. So if the lord had been attainted by verdict or confeſſion, any grant by copy after the felony or murder committed ſhall ſtand good, notwithſtanding the relation. If the lord of a manor acknowledge a ſtatute, and then granteth lands by copy, and after the manor is delivered to the cogniſee in extent: the grant cannot by this be impeached. And if the lord of a manor taketh a wife, and after maketh copyhold eſtates according to the cuſtom, and dieth; though the feme hath this manor aſſigned unto her for her dower, yet cannot ſhe avoid theſe copyhold eſtates, becauſe the copyholders are in by a title paramount the title of the feme, *viz.* by cuſtom. But, peradventure, if the heir, after the death of his anceſtor, before the aſſignment made unto the feme for her dower, had granted lands by copy; the feme might avoid theſe grants, becauſe inſtantly upon the death of the baron her title received his perfection, and nothing more was wanting to the confirmation of her intereſt. But though the quantity of the lord's eſtate in the manor be not reſpected, yet the quantity of his eſtate in

the copyhold is regarded. For if a copyholder in fee ſurrender to the uſe of the lord for life, the remainder over to a ſtranger, or reſerveth the reverſion to himſelf, if the lord will grant this by copy in fee, whatſoever eſtate the lord hath in his manor, yet having but an eſtate for life in the copyhold, no larger eſtate ſhall paſs than he himſelf hath; * *Quia nemo poteſt plus juris in alium transferre quàm ipſe habet.* And farther obſerve, that ſometimes the law reſpecteth the quantity of the lord's eſtate in the manor: for what acts ſoever are not confirmed by cuſtom, but only ſtrengthened by the power, authority and intereſt of the lord, have no longer continuance than the lord's eſtate continueth; and therefore it is held, that if a tenant for life of a manor granteth a licence to a copyholder to alien, and dieth, the licence is deſtroyed, and the power of alienation ceaſeth. As for the quality of the lord's eſtate in the manor, that is much more now reſpected than either the quality of his eſtate or the quality of his perſon: for if the lord, or he (whoſoever he be) that maketh a voluntary grant by copy, hath no lawful intereſt in the manor, but only an uſurped title, his grant ſhall never ſo bind the right owner, but that upon his entry he may avoid them; otherwiſe we ſhould make cuſtom an agent in a wrong, which the law will never ſuffer. And yet if the lord of a manor by his will in writing deviſeth, that his executor ſhall grant copy-

* *Becauſe no one can transfer more right to another, than he had himſelf.*

hold

hold eſtates, * *ſecundùm conſuetudinem manerii*, for the payment of his debts, *&c.* and he make voluntary grants accordingly; theſe grants are good, notwithſtanding the executor hath no intereſt in the manor, nor is † *dominus pro tempore.*

If a diſſeiſor of a manor dieth ſeiſed, notwithſtanding his heir come in by ordinary courſe of deſcent, yet becauſe the tort commenced by his anceſtor is ſtill inherent to his eſtate, if any copyhold eſtate be granted by the heir, it may be avoided by the diſſeiſor immediately upon his recovery, or upon his entry: and ſo if the diſſeiſor infeoff a ſtranger of the manor, notwithſtanding the feoffee come in by title, yet no grant made by him of copyhold-land ſhall ever bind the diſſeiſed, no more than a grant made by the diſſeiſor himſelf.

If tenant in tail of a manor diſcontinueth and dieth, and after the diſcontinuance granteth copyhold eſtates; the heir recovering in a formedon in the diſcender may avoid theſe grants: for though the diſcontinuee come in under a juſt title, yet his intereſt being determined by the death of the tenant in tail, the continuance of the poſſeſſion is a tort to the heir, and acts done by tortfeiſors, tending to the diſinheritance of the right owners, cuſtom will never ſo ſtrengthen, but they may be annihilated. So if a man ſeiſed of a manor in right of his wife alieneth this manor, and dieth; any grant made of copyhold eſtates af-

* *According to the cuſtom of the manor.*
† *Lord for the time.*

ter

ter his death may be avoided by the feme upon her entry, or upon her recovery in a *Cui in vita.*

If a manor be granted * *par auter vie*, and † *Ceſtuy que vie* dieth, and the grantee continueth ſtill in the manor, and maketh grants by copy, theſe ſhall not bind the grantor of the manor; for immediately upon the death of † *Ceſtuy que vie* the grantee was but a tenant at ſufferance, and had no manner of lawful intereſt; for a writ of entry ‡ *ad terminum qui præteriit* lieth againſt him, as againſt deforceor.

And ſo if a tenant for life of a manor maketh a leaſe for years of the ſame manor, and dieth; copyhold eſtates, granted by the leſſee after the death of the tenant for life are voidable by the firſt leſſor.

If a leſſee for years of a manor granteth a copyhold in reverſion, and before the reverſion eſchue the term is expired, the grant is void. And ſo I take the law to be, if the leſſee ſurrendereth his term, and then before his leaſe ſhould have ended in point of limitation the reverſion falleth, yet the grantee ſhall not have it.

If a leaſe be made for years of a manor, the leaſe to be void upon the breach of a certain condition, if the condition be broken, and afterwards the leſſee before the entry of the leſſor granteth eſtates by copy, theſe grants ſhall never exclude the leſſor; for preſently upon the breach of the condition the leaſe is void: but had the manor been granted for life,

* *For another's life.* † *He for whoſe life.*
‡ *For the term which has paſſed.*

in

in tail, or in fee, I think the law would have fallen out otherwiſe; for before entry the frank-tenement had not been avoided, and whereſoever a man may enter and avoid any eſtate of frank-tenement upon the breach of a condition, the law adjudgeth nothing to be in him before entry, and he may wave the advantage which he might take by the breach of the condition, if he will; and therefore notwithſtanding the accruer of the title of the grantor, yet before this title be executed by entry, the grantee hath ſuch a lawful intereſt, that what eſtate ſoever he granteth by copy in the interim ſhall ſtand good againſt the grantor. And ſo if an infant infeoff me of a manor, though he may enter upon me at his pleaſure: yet grants made by me by copy before his entry ſhall never be defeated by any ſubſequent entry.

And the ſame law is of grants made by a villain purchaſer of a manor, before the entry of the lord; or of grants made after an alienation in mortmain, before the lord paramount hath entred for a forfeiture.

If a parſon after inſtitution, and before induction, a manor being parcel of his glebe-lands, grants lands by copy, and after is inducted; this admitting of the copyholders is no binding act: for though as to the ſpiritualties he be a compleat parſon preſently upon the inſtitution, yet as to the temporalties he is not compleat before induction. So if a parſon be admitted, inſtituted and inducted, but doth not ſubſcribe to the articles, according to the ſtatute of 13 *Eliz. cap.* 20. and granteth lands by copy, as before; this grant ſhall not conclude

clude the ſucceeding incumbent, becauſe his admiſſion, inſtitution and induction were wholly void in themſelves: but had the parſon been deprived for crime of hereſy, or for being meer *laicus*, although he be declared by ſentence to be uncapable of a benefice, and ſo his preſentment void (* *ab initio*;) yet becauſe the church was once full, until the ſentence declaratory came, although the deprivation ſhall relate to ſome purpoſes, yet becauſe the preſentment is not in itſelf void, ſurely a relation ſhall never be ſo much favoured as to avoid a copyhold-eſtate in this kind.

So much of grants made by the lords themſelves. In grants made by copyholders, as the law reſpecteth the quality of the copyholders eſtate; ſo doth it reſpect both the quality of his perſon, and quantity of his eſtate.

The quality of his perſon: for whoſoever is uncapable of diſpoſing of land at the Common law, cannot without ſpecial cuſtom paſs away any copyhold. The quantity of his eſtate: for no copyholder can poſſibly paſs away more than is in him; and therefore if there be joint-tenants of a copyhold, one cannot alien the whole. But if there be two joint-tenants of a manor, and a copyholder eſcheateth, one of them may grant this copyhold and his companion ſhall never avoid any part of it.

If a copyholder for life, the remainder over in fee to a ſtranger, ſurrendereth in fee, and the lord admits accordingly; yet an eſtate for life only paſſeth.

* *From the firſt.*

So

So if the lord of a manor granteth a copyhold for life, where an eſtate in fee is warrantable, and the ſame grantee ſurrenders in fee to the uſe of a ſtranger, and the lord admits him * *ſecundùm officium ſurſumreddítionis*; I think no fee paſſeth: for though the lord's admittance may *primâ facie* ſeem to amount to a confirmation of the eſtate ſurrendered; the reverſion reſteth in him to diſpoſe of according to the cuſtom. As where a leſſee for years at the Common law maketh a feoffment in fee, and maketh a letter of attorney to his leſſor, to deliver livery and ſeiſin, who executeth it accordingly: though the leſſor be uſed as an inſtrument to perform, the will of the leſſee, yet this being his voluntary act, the law taketh it as a conſent for the paſſing away of the whole inheritance. But if you look narrowly into both caſes, you ſhall find the difference: in the latter caſe, by the feoffment the fee is deveſted out of the leſſor, and therefore a conſent will ſerve to transfer the reverſion; but in the former caſe, the reverſion is not pluckt out of the lord by the ſurrender, and therefore an implied conſent is too weak to remove it. I will only add one obſervation more, and ſo I will end with the grantor.

The law is not ſo ſtrict to a copyholder, as that he muſt come perſonally into court upon the making of every ſurrender, but he may ſurrender by attorney, as well as livery and ſeiſin may be made by attorney at the Common law: and ſhould the law be otherwiſe, great inconvenience would enſue; for how

* *According to the method of Surrendering.*

ſhould

What perſons ſoever are capable of a grant by copy may well take by attorney, not that the lord ſhall be enforced to admit any one by attorney, becauſe upon every admittance there is fealty due by the party admitted, which is a duty ſo inſeparably annexed to the perſons, that it cannot be diſcharged by deputy, and therefore no reaſon the lord ſhould be inforced to admit by attorney; but if he will admit him, it ſtandeth good.

It is not neceſſary that, upon ſurrenders of copyholds, the name of the party to whoſe uſe the ſurrender is made, be preciſely ſet down; but if by any manor of circumſtance the grantee may be certainly known, it is ſufficient. And therefore a ſurrender made to the lord archbiſhop of *Canterbury*, or the lord-mayor of *London*, or the high ſheriff of *Norfolk*, without mentioning either their chriſtian name or ſurname, are good enough, and certain enough, becauſe they are certainly known by this name, without farther addition. So if I ſurrender to the uſe of the next of my blood, to the uſe of my wife, to the uſe of my brother or ſiſter, having but one brother or one ſiſter; theſe ſurrenders are good without any additions, becauſe the grantee may certainly be known by theſe words.

If I ſurrender generally into the hands of the lord, not expreſſing to whoſe uſe the ſurrender ſhall be; this ſurrender is a good ſurrender, and ſhall enure to the benefit of the lord.

If I ſurrender to the uſe of my ſon *W.* having more ſons than one of that name; yet by an averment this incertainty may be helped.

But

But if I ſurrender to the uſe of my couſin, or my friend; this is ſo general and ſo incertain, that no ſubſequent manifeſtation of my intention can any way ſtrengthen it.

So if three ſurrender to the uſe of three or four of St. *Dunſtan*'s pariſh, not naming the pariſhioners by their names; this ſurrender is utterly void.

And ſo if I ſurrender in the disjunction to the uſe of *J. L.* or *J. N.* this is inſufficient for the incertainty.

And in cuſtomary grants upon ſurrenders the law is not ſo ſtrict as in grants at the Common law. For in grants at the Common law, if the grantee be not in * *rerum naturâ*, and able to take by virtue of the grant preſently upon the grant made, it is meerly void: But in cuſtomary grants upon ſurrenders the law is otherwiſe: for though at the time of the ſurrender the grantee is not *in eſſe*, or not capable of a ſurrender; yet if he be *in eſſe* and capable at the time of the admittance, that is ſufficient: and therefore if I ſurrender to the uſe of him that ſhall be heir to *J. S.* or to the uſe of *J. S.*'s next child, or to the uſe of *J. S.*'s next wife; though at the time of the ſurrender *J. S.* had no heir, child, or wife, yet if afterwards he hath a child, or taketh a wife, his heir, his child or his wife may come into the court, and compel the lord to admit according to the ſurrender. So if I ſurrender to the uſe of him that ſhall come next into *Pauls* after ſuch an hour: whoſe fortune ſoever it is to come firſt, the lord muſt admit him, and I

* *In the nature of things.*

ſhall never avoid it. The ſame law is, if I ſurrender to the uſe of him that *J. S.* ſhall nominate, or that I myſelf ſhall nominate to the lord at the next meeting.

The reaſon of the law is this; A ſurrender is a thing executory, which is executed by the ſubſequent admittance, and nothing at all is inveſted in the grantee before the lord hath admitted him according to the ſurrender; and therefore if at the time of the admittance the grantee be in * *rerum natura*, and able to take, that will ſerve.

Beſides, in cuſtomary grants the intent of the grantor is more reſpected than it ſhould be by the ſtrict rules of the law: which appeareth by this, that if a ſurrender be made of a copyhold to the uſe of a laſt will, and the ſurrender or deviſeth it unto two, the one is admitted according to the purport of the will, this ſhall inure to both. But though the ſurrender be a thing executory and the intent of the grantor ſo much favoured; yet if a copyholder will ſurrender to the uſe of the right heirs of *J. S.* he being alive, this is void, becauſe it cannot take effect according to the intent of the grantor; for he would have the grant to be executed preſently, which cannot be, in regard that *J. S.* can have no heir till after his death. So much of the grantee: and I come now to the grant itſelf.

* *In the nature of things.*

SECT.

SECT. XXXVI.

A COPYHOLD intereſt cannot be transferred by any other aſſurance than by copy of court-roll, according to the cuſtom.

If I will exchange a copyhold with another, I cannot do it by an ordinary exchange at the Common law, but we muſt ſurrender to each other's uſe, and the lord admit us accordingly.

If I will deviſe a copyhold, I cannot do it by will at the Common law, but I muſt ſurrender to the uſe of my laſt will and teſtament, and in my will I muſt declare my intent.

If I am ouſted by a copyholder, a releaſe made to him is void, becauſe it would be a prejudice to the lord; and beſides, there is no cuſtomary right upon which the releaſe may inure: but a releaſe inuring by the way of extinguiſhing, where to prejudice accrueth to the lord, will ſerve to drown a copyhold right; and Co. 4. *fol.* 25. therefore if I ſurrender out of court upon condition to the uſe of *J. S.* and the preſentment is made abſolute in court, and the admittance framed accordingly, this admittance and preſentment differing from the effect of the ſurrender are both void. Yet becauſe upon the admittance the lord is ſatisfied of his fine, and ſo nothing at all prejudiced, and beſides here is a cuſtomary right upon which the releaſe may be grounded; I may by a releaſe at the Common law ſufficiently confirm this void eſtate. And ſo upon the ſame reaſon, if I am ouſted of a copyhold, and the lord admit him according to the cuſtom, a releaſe made by me at the Common law will extinguiſh my right;

but if I make a leaſe for years of a copyhold, I cannot by my releaſe paſs my reverſion, becauſe this releaſe inureth by way of enlargement to transfer an intereſt, and not by way of extinguiſhment to drown a right; but my way is to ſurrender my reverſion into the hands of the lord, and he to grant it over to the leſſee.

SECT. XXXVII.

IF copyhold-land come into that plight that it cannot paſs by copy, it is become not alienable: and therefore if the lord of a manor will grant to me a copyhold in fee, and after will grant the inheritance of this copyhold to a ſtranger, in regard that now my copyhold is become no parcel of the manor, and ſo I cannot ſurrender into the hands of the lord and the grantee of the inheritance, though I am to him a tenant, and am tied to do unto him all manner of ſervices which are due without keeping of court, as to pay rent, to diſcharge herriots, and all other duties of the ſame nature: yet becauſe the grantee cannot keep a court, and ſo is incapable of taking a ſurrender, or making an admittance, therefore I cannot by any means alien; for no conveyance at the Common law will ſerve, becauſe it remaineth ſtill copyhold notwithſtanding, and what cuſtoms ſoever were incident to the land before ſeverance, do remain ſtill undeſtroyed: as if the land were Burrow-Engliſh or Gavel-kind before, it ſo continueth; and a decree in chancery will ſerve no more than an ordinary aſſurance at the Common law; for

Co. 4. *fol.* 24.

that bindeth my perſon only, not my intereſt. Since therefore copyhold eſtates cannot be conveyed away otherwiſe than by copy of court-roll, according to the cuſtom, let us examine the nature of theſe cuſtomary grants, wherein three branches are to be conſidered.

1. The *Surrender.*
2. *Preſentment.*
3. *Admittance.*

In ſome grants a ſurrender is ſufficient, without preſentment or admittance.

In ſome an admittance, without a ſurrender or preſentment.

In ſome a ſurrender and admittance, are both neceſſary; and in ſome a ſurrender, preſentment and admittance are all requiſite.

SECT. XXXVIII.

IF a copyholder will ſurrender to the uſe of the lord, the intereſt of the copyhold is ſufficiently veſted in the lord immediately upon the ſurrender, without any admittance of the lord, becauſe the lord cannot admit himſelf.

If the lord will make a voluntary grant of a copyhold, no ſurrender is requiſite; for by the admittance of the lord according to the cuſtom the copyholder is ſufficiently ſettled in his land, without any other ceremony.

If a copyholder will ſurrender in court to the uſe of a ſtranger, beſides the ſurrender the admittance is requiſite: and if the ſurrender be made out of court into the hands of the lord himſelf, which the general cuſtom will warrant, or into the hands of the bailiff or

two tenants of the manor, which by ſpecial cuſtom only is warrantable; beſides a ſurrender, two other ceremonies are requiſite; the one a true preſentment of the ſurrender in court by the ſame perſons into whoſe hands the ſurrender was made; the other is an admittance of the lord according to the effect and tenor both of the ſurrender and preſentment.

But now more particularly of every one of them apart, and firſt of a ſurrender.

SECT. XXXIX.

THIS word *Surrender* is *vocabulum artis*; and therefore where a ſurrender is needful, if this one word be wanting, all other words uſed in ordinary conveyances are uneffectual and inſufficient to convey any copyhold eſtate: for if a copyholder come into court, and offer to paſs his copyhold by word of grant, of gift, of bargain or ſale, or ſuch like, I doubt he will fail of his purpoſe: for as he is tied to a ſingular form of aſſurance, ſo is he reſtrained to peculiar words in his aſſurance.

Surrenders are made in ſeveral ſorts according to the ſeveral cuſtoms of manors.

In ſome manors, where a copyholder ſurrendereth his copyhold, he uſeth to hold a little rod in his hand, which he delivereth to the ſteward or bailiff, according to the cuſtom of the manor, to deliver it over to the party to whoſe uſe the ſurrender was made in the name of ſeiſin; and from thence they are called *Tenants by the Verge.*

In

In ſome manors, inſtead of a wand a ſtraw is uſed; and in other manors a glove is uſed, * *Et conſuetudo loci ſemper eſt obſervanda.*

A ſurrender (where by a ſubſequent admittance the grant is to receive his perfection and confirmation) is rather a manifeſting of the grantor's intention, than of paſſing away any intereſt in the poſſeſſion; for till admittance the lord taketh notice of the grantor as tenant, and he ſhall receive the profits of the land to his own uſe, and ſhall diſcharge all ſervices due to the lord: but yet the intereſt is in him but *ſecundum quid*, and not abſolutely; for he cannot paſs away the land to any other, or make it ſubject to any other incumbrance than it was ſubject to at the time of the ſurrender; neither in the grantee is any manner of intereſt inveſted before admittance; for if he enter he is a treſpaſſer, and puniſhable in treſpaſs; and if he ſurrender to the uſe of another, the ſurrender is meerly void, and by no matter *ex poſt facto* can be confirmed. For though the firſt ſurrender be executed before the ſecond, ſo that at the time of the admittance of him to whoſe uſe the ſecond ſurrender was made his ſurrenderor hath a ſufficient intereſt as abſolute owner; yet becauſe at the time of the ſurrender he had but a poſſibility of an intereſt, therefore the ſubſequent admittance cannot make this act good which was void *ab initio*. But though the grantee hath but a poſſibility upon the ſurrender, yet this is ſuch a poſſibility as is accompanied with a certainty; for the grantee cannot poſſibly be

* *And the cuſtom of the place is always to be obſerved.*

deluded or defrauded of the effect of his ſurrender, and the fruits of his grant: for if the lord refuſe to admit him, he is compellable to do it by a *ſubpœna* in the chancery; and the grantor's hands are ever bound from the diſpoſing of the land any other way, and his mouth ever ſtopped from revoking or countermanding his ſurrender. But, peradventure, if a copyholder languiſhing in extremity ſurrendereth out of court to the uſe of his couſin, in conſideration of conſanguinity, or to the uſe of his ſon, in conſideration of natural love and affection, and after recovereth his health before preſentment; this ſurrender is revocable or countermandable: but if it be granted upon valuable conſideration, as for the diſcharge of debts, or for a ſum of money paid, though it be made out of court, yet it is as binding as any ſurrender whatſoever made in court.

And thus much for a Surrender: a word of a Preſentment.

SECT. XL.

THE *Preſentment*, by the general cuſtoms of manors, is to be made at the next court-day immediately after the ſurrender; but by ſpecial cuſtom in ſome places it will ſerve at the ſecond or third court. And it is to be made by the ſame perſons that took the ſurrender, and in all points material according to the true tenour of the ſurrender. And therefore if the ſurrender be conditional, and the preſentment be abſolute, both the ſurrender,

der, preſentment and admittance thereupon are wholly void.

But if the conditional ſurrender be preſented, and the ſteward in entering of it omitteth the condition; yet upon ſufficient proof made in court, the ſurrender ſhall not be avoided, but the roll amended: and this ſhall be no concluſion to the party, to plead or give in evidence the truth of the matter.

If I ſurrender out of court, and die before preſentment, if preſentment be made after my death, according to the cuſtom, this is ſufficient. So if he to whoſe uſe the ſurrender is made dieth before preſentment; yet upon preſentment made after his death, according to the cuſtom his heir ſhall be admitted. And ſo if I ſurrender out of court to the uſe of one for life, the rendror and the leſſee for life dieth before preſentment; yet upon preſentment made, he in the remainder ſhall be admitted. And ſo if I ſurrender to two jointly, and one dieth before preſentment, the other ſhall be admitted to the whole. The ſame law is, if thoſe into whoſe hands the ſurrender is made, die before preſentment, upon ſufficient proof in court that ſuch a ſurrender was made, the lord ſhall be compelled to admit accordingly. and if the ſteward, the bailiff, or the tenants into whoſe hands the ſurrender is made, refuſe to preſent, upon a petition or a bill exhibited in the lord's court the party grieved ſhall find remedy. But if the lord will not do him right, he may both ſue the lord and them that took the ſurrender in the chancery, and ſhall there find relief. Co. 4. *fol.* 39. *b.*

Thus

Thus much of Preſentment: a word of Admittances.

SECT. XLI.

ADMITTANCES are threefold.

1. An admittance upon a voluntary grant.
2. An admittance upon ſurrender.
3. An admittance upon a deſcent.

In voluntary admittances the lord is an inſtrument: for though it is in his power to keep the land in his own hands, or to diſpoſe of it at his pleaſure, and to that intent he may be reputed as abſolute owner; yet becauſe in diſpoſing of it he is bound to obſerve the cuſtom preciſely in every point, and can neither in eſtate nor tenure bring in any alteration, in this reſpect the law accounts him cuſtom's inſtrument. If the cuſtom doth warrant an eſtate only *durante viduitate*, and the lord admits for life; this ſhall not bind his heir or ſucceſſor, becauſe cuſtom hath not ſufficiently confirmed it. So if the lord fail in reſerving * *verum et antiquum redditum*; as if he reſerveth ten ſhillings, where the uſual rent cuſtomably reſerved is twenty ſhillings; this may be a means to avoid the admittance. And the law is very ſtrict in this point of reſervation; for though the ancient accuſtomable rent be reſerved according to the quantity, yet if the quality of the rent be altered, the heir may avoid this grant. For if the ancient rent from time to time hath been twenty ſhillings in gold, and the lord re-

* *The true and ancient rent.*

ſerveth

ſerveth it in ſilver, this variance of the quality of the rent is in force to deſtroy the grant: ſo, if the ancient rent hath been accuſtomably paid at four feaſts in the year, and the lord reſerveth it at two feaſts. So, if two copyholds eſcheat to the lord, the one of which hath been uſually demiſed for twenty ſhillings rent, the other for ten ſhillings rent, and he granteth them both by one copy for one rent of thirty ſhillings; this is not good: and ſo if a copyhold of three acres eſcheats, which hath ever been granted for three ſhillings rent, and the lord granteth one acre, and reſerveth *pro rata* one ſhilling rent, * *verus et antiquus redditus* is not reſerved. But if a copyhold of ſix acres, which hath ever been demiſed for ſix ſhillings rent, eſcheated to two copartners, and one granteth three acres, reſerving three ſhillings *pro rata*; this is a perfect reſerving.

In admittances upon ſurrender, the lord to no intent is reputed as owner, but wholly as an inſtrument; and the party admitted ſhall be ſubject to no other charges or incumbrances of the lord, for he claims his eſtate under the party that made the ſurrender: and in the plaint in the nature of a writ of entry in the *per* it ſhall be ſuppoſed in the *per* by him, not by the lord,

And as in admittances upon ſurrenders, ſo in admittances upon deſcents, the lord is uſed as a meer inſtrument, and no manner of intereſt paſſeth out of him; and therefore neither in the one nor in the other is any reſpect had unto the quality of his eſtate in the ma- Co 4. *fol.* 27. *b.*

* *The true and ancient rent.*

nor

nor; for whether he hath it by right or by wrong it is not material, theſe admittances ſhall never be called in queſtion for the lord's title, becauſe they are judicial acts, which every lord is enjoined to execute.

Co. 1. *fol.* 140. *b.*

Beſides, in admittances upon ſurrenders the lord being accounted nothing but a neceſſary inſtrument, it followeth that he hath a bare cuſtomary power to admit * *ſecundum formam et effectum ſurſumreddendi:* therefore if there be any variance between the admittance and the ſurrender either in the perſon, in the eſtate, or in the tenure, or in any other collateral points, the lord doth only transfer an eſtate according to the ſurrender and his authority, if it can take ſuch effect. As if I ſurrender to the uſe of *J. S.* and the lord admits *J. N.* this admittance is wholly void: and notwithſtanding this admittance, the lord may afterwards admit *J. S.* according to the effect of his authority: but had he admitted *J. S.* and *J. N.* jointly, then the admittance had been void for the one, and good for the other, like the caſe of a deviſe; where a deviſe of a term is made to *J. S.* and the executors agree that *J. S.* and *J. N.* ſhall have this term, this conſent is void to *J. N.*; for after the conſent of the executors, *J. S.* is in by the deviſe. Yet ſome are of opinion, that if I ſurrender to the uſe of *J. S.* in fee, and the lord admits *J. S.* together with his eldeſt ſon and heir apparent, that this is an eſtate by eſtoppel to *J. S.* and that he ſhall only claim jointly with his ſon, becauſe he might have refuſed an admittance

Co. 4. *fol.* 18.

* *According to the form and effect of the ſurrender.*

in

in this manner: but I can hardly be brought to think that this admittance, giving a preſent intereſt in the ſon, who by ſurrender was to have no intereſt till the death of his father, ſhould be any ſuch eſtoppel.

If I ſurrender to the uſe of *J. S.* for life, and the lord admits him in fee, an eſtate for life only paſſeth. So if I ſurrender without mentioning any certain eſtate, becauſe by implication of the law eſtate for life only paſſeth, though the lord admit in fee, no more doth paſs than the implication of law will warrant. If I ſurrender with the reſervation of a rent, and the lord admits, not reſerving any rent, or reſerving a leſs rent than I reſerved upon the ſurrender, this admittance is wholly void: but if the lord reſerveth a greater rent, then is the reſervation void only for the ſurpluſage, and the admittance ſo far currant as it agreeth with my ſurrender. If I ſurrender upon condition, and the lord omits the condition, the admittance is wholly void: but if my ſurrender be abſolute, and the lord's admittance be conditional, the condition is void, but the admittance in all points elſe is good. Co. 4. *fol.* 29. Co. 4. *fol.* 25.

The reaſons of theſe diverſities are theſe. Where an authority is given to any one to execute any act, and he executeth it contrary to the effect of his authority, this is utterly void: but if he executeth his authority, and withal goeth beyond the limits of his warrant, this is void for that part only wherein he exceedeth his authority.

Theſe admittances upon ſurrender differ from admittances upon deſcents in this, that in admittances upon ſurrender nothing is veſted in

in the grantee before admittance, no more than in the voluntary admittances; but in admittances upon deſcents the heir is tenant by copy immediately upon the death of his anceſtor, not to all intents and purpoſes: for peradventure he cannot be ſworn of the homage before, neither can he maintain a plaint in the nature of an aſſiſe in the lord's court before, becauſe till then he is not compleat tenant to the lord, no farther forth than the lord pleaſeth to allow him for his tenant. And therefore if there be grandfather, father and ſon, and the grandfather is admitted, and dieth, and the father entreth, and dieth before admittance, the ſon ſhall have a plaint in the nature of a writ of Ayel, and not an aſſiſe of mortdaunceſtor. So that to all intents and purpoſes the heir, till admittance, is not compleat tenant; yet to moſt intents, eſpecially as to ſtrangers, the law taketh notice of him as of a perfect tenant of the land inſtantly upon the death of his anceſtor: for he may enter into the land before admittance, take the profits, puniſh any treſpaſs done upon the ground, ſurrender into the hands of the lord to whoſe uſe he pleaſeth, ſatisfying the lord his fine due upon the deſcent, and by eſtoppel he may prejudice himſelf of his inheritance: for if an eſtrange come and ſurrender to the uſe of him and his wife before admittance, he ſhall ever claim jointly with his wife, and never be taken as ſole tenant. And the lord may avow upon him before admittance for any arrearages of rent or other ſervices. And laſt of all, upon an actual poſſeſſion, there ſhall be *poſſeſſio fratris* before admittance: for if a copyholder in fee

Co. 4. *fol.* 23.

Co. 4. *fol.* 22. *b.*

fee have iſſue a ſon and a daughter by one venter, and a ſon by another venter, and dieth ſeiſed, and his ſon by the firſt venter entreth into the land, and dieth before admittance, the daughter ſhall inherit as heir to her brother; and not the ſon by the ſecond venter as heir to his father. And many times the poſſeſſion of a guardian or a termor, without an actual entry, or any claim made by the heir, will make a *poſſeſſio fratris:* as if a copyholder in fee having iſſue a ſon or a daughter by one venter, and a ſon by another venter, by licence of the lord maketh a leaſe for years, and dieth, and the ſon of the firſt venter dieth before the expiration of the term, being neither admitted, nor having made any actual entry, or any claim; yet this poſſeſſion of the leſſee is ſufficient, and the reverſion ſhall deſcend to the daughter of the firſt venter, and not to the ſon of the ſecond venter. But if the leaſe had been determined living the ſon by the firſt venter, and afterwards he had died before any actual entry made, the law would have fallen out otherwiſe, becauſe there was a time when he might have lawfully entered. Therefore where ſome have imagined that nothing ſhould be inveſted in the heir before admittance, becauſe every admittance of an heir upon a deſcent amounteth to a grant, and ſo may be pleaded; they are in an error: for though it be true, that after admittance the heir may in pleading alledge this as a grant, and that hath been allowed, to avoid the inconveniencies that otherwiſe ſhould enſue; for if the copyholder ſhould be driven in pleading to ſhew the firſt grant, either that was made before the memory of man, Co. 4 *fol.* 22. *b.*

man, and ſo is not pleadable, or ſince the memory of man, and then cuſtom fails; for this reaſon the law hath allowed a copyholder in pleading to alledge any admittance, as well upon a deſcent as upon a ſurrender, as a grant: and yet he may, if he will, alledge the admittance of his anceſtors as a grant, and ſhew the deſcent to him, and that he entered, and well, without any admittance. But the heir cannot plead that his anceſtor was ſeiſed in fee at the will of the lord, by copy of court-roll, of ſuch a manor, according to the cuſtom of the manor, and that he died ſeiſed, and that the copyhold deſcended upon him; becauſe in truth ſuch an intereſt is but a particular intereſt at will, in judgment of law, although it be deſcendable by cuſtom.

So that I conclude, that an admittance is principally for the benefit of the lord, to intitle him to his fine, and not much neceſſary for ſtrengthening of the heir's title.

Then will ſome ſay, if the benefit which the heir ſhall receive by the admittance will not countervail the charges of the fine, he will never come in, and take up his copyhold in court, and ſo defeat the lord of his fine. I aſſure myſelf, if it were in the election of the heir to be admitted or not to be admitted, he would be beſt contented without admittance; but the cuſtom in every manor is compulſory in this point: for either upon pain of forfeiture of their copyhold, or of incurring ſome great penalty, the heirs of copyholders are inforced in every manor to come into court, and be admitted according to the cuſtom, within a

ſhort

ſhort time after notice given of their anceſtor's deceaſe.

And thus much of the grant itſelf: a word of the things granted.

SECT. XLII.

THINGS that lie not in tenure are not grantable by copy; as rents, bailiwicks, ſtewardſhips, common in groſs, advowſons in groſs, and ſuch like; all which are incorporate hereditaments, and therefore no rent can iſſue out of them, neither can they be held by any manner of ſervice. But an advowſon appendant, a common appendant or a fair appendant may paſs by copy, by reaſon of the principal thing to which they are appendant: and generally what things ſoever are parcel of the manor, and are of perpetuity, may be granted by copy, according to the cuſtom; as underwoods growing upon the manor, being things of continuance, (for after they are cut they will grow again * *ex ſtipitibus*) may well be granted by copy; and ſo of herbage or any other profit of the manor. And ſometimes of the grant of a copyhold things ſhall paſs that are ſevered from the manor; as if the lord of a manor grant his manor for years, *except. boſcis et ſubboſcis* growing in certain copyhold ground, and the leſſee by his ſteward granteth a copyhold, within which manor there is a cuſtom that every copyholder may take within his copyhold woods and underwoods growing upon the ground for his neceſſary fuel; not- Co. 4. *fol.* 31.

* *From the roots.*

withſtanding this exception in the leaſe of the manor, the copyholder may cut down woods or underwoods according to the cuſtom, tho' by exception ſevered from the manor: for though the leſſee of the manor, in reſpect of the exception, could not meddle with the woods or underwoods, and ſo it might ſeem *primâ facie* very probable that the copyholder, coming in by the voluntary admittance of the leſſee, ſhould have no more authority nor intereſt than the leſſee himſelf had; yet becauſe the copyholder was once in by cuſtom, and ſo his title being grounded upon cuſtom is paramount the exception, therefore the exception in the leaſe of the manor, though preceding the grant of the copyhold, cannot any way touch or prejudice the copyholder. And ſo, if there be a cuſtom within a manor, that copyholders have uſed to have common in the waſtes of the lord, and the lord granteth away his waſtes, and after granteth a copyhold: the copyholder ſhall have common: but in alledging the cuſtom he ſhall not ſay, * *Quòd infra maner. præd. talis habetur conſuetudo*, but that till ſuch a time, *viz.* before the ſeverance, † *talis habebatur, et toto tempore, &c. conſuetudo*, and then ſhew the ſeverance. If there be an incertainty in the things granted, the grant is not therefore inſufficient; for by the election of him that is the firſt agent it may be made certain.

As if I grant by copy twenty loads of haſel or twenty loads of maple, in the disjunctive, Co. 4. *fol.* 31. *a.*

* *That ſuch a cuſtom exiſts within the aforeſaid manor.*
† *Such a cuſtom did exiſt, and all the time &c.*

to

to be cut down and taken by the grantee in my manor of *Dale*, there the grantee hath election to make choice of which he pleaſeth, becauſe he is to perform the firſt act of cutting down and taking them: but if I am to cut them down, and deliver them to the grantee, then have I the election. And obſerve this difference touching this point of election. Co. 2. *fol.* 37. a.

If a grant be made in the disjunctive of two annual things and things of continuance; if the election belong to the grantor, and he faileth at the day to make election, yet his election is not determined, but continueth the ſame after the day that it was before the day: but otherwiſe it is where things are not annual, but are to be performed * *unicâ vice tantum.*

Therefore if the lord of a manor granteth by copy twenty trees growing upon *black acre* or *white acre*, to be cut down yearly by himſelf, and to be delivered to the grantee at ſuch a day; though the grantor fail at his day to make his election, yet his election is not gone, becauſe the things granted are annual: but had theſe trees been to be delivered to the grantee once only, and not yearly, then by the failure of the grantor at the day the election is devolved to the grantee.

SECT. XLIII.

AND thus much of the thing granted: a word of the inſtruments through whoſe hands, as through conduit-pipes, the lands are *gradatim* conveyed to the purchaſer. I will not ſpeak of thoſe men that are uſed as inſtruments by ſpecial cuſtom to preſent in court

* *But once.*

ſurrenders taken out of court: Theſe I have ſufficiently ſpoken of already. I will here point only at thoſe perſons that, by the general cuſtom of every manor, are employed as neceſſary inſtruments in cuſtomary admittances, and will curſorily examine the extents of their authorities, and the quality of their offices.

The perſons I aim at are theſe;

1. The *Lord*,
2. The *Steward*,
3. The *Underſteward*.

SECT. XLIV.

THE *lord*'s authority conſiſteth chiefly in theſe things.

1. In puniſhing offences and miſdemeanors committed within his precincts; as not performance of cuſtoms, breach of bylaws, not diſcharging of duties, and ſuch like.

2. In deciding controverſies ariſing about the title of copyhold land lying within his bounds: and when he ſitteth as judge in court to end debates of this nature, he is not tied to the ſtrict form of the Common law, for he is a chancellor in his court, and may redreſs matters in conſcience upon bill exhibited, where the Common law will afford no remedy in the ſame kind; as to inſiſt in one familiar example. If I ſurrender a copyhold to the uſe of a ſtranger, upon confidence that, ſuch debts being by me diſcharged, he ſhall ſurrender back this copyhold; I upon diſcharge of the debts demand a ſurrender, and he refuſeth; at the Common law I were left remedileſs, this being a bare confidence, and no condition; but

but upon bill exhibited in the lord's court I ſhall be relieved, for the lord upon proof of the matter may ſeiſe the copyhold, and readmit me, according to the effect of the confidence.

3. In admitting copyhold. And in this cuſtomary power of admittance the lord doth ſomewhat outſtrip the ſteward; for the lord may make either admittances upon voluntary grants, admittances upon ſurrenders, admittances upon deſcents, in any place where he pleaſeth out of the manor, but ſo cannot the ſteward: and in giving licence to copyholders to alien by deed; and in this point of licence the lord's authority doth exceed the ſteward's authority. For though ſome are of opinion, that it is both uſual and warrantable for the ſteward of a manor, in abſence of his lord, to licenſe a copyholder in full court to alien by deed for as many years as he ſhall think good, becauſe he is judge in the court, and beſides the entry of it in the court-roll is in this manner, * *Ad hanc curiam* J. S. *petit licentiam domini dimittendi, &c. cui dominus licentiam dat, &c.* and therefore this licence being granted in the lord's name in full court, the lord ſhall never enter for a forfeiture, but ſhall ever be eſtopped to ſay the contrary, but that he did give licence: yet (under reformation be it ſpoken) I much miſtruſt the truth of this opinion; for this power of licenſing copyholders to alien by deed is not cuſtomary; for then it were as proper to the ſteward as to the lord, but it is a power of intereſt annexed to the perſon Co. 4. *fol.* 27.

* *J. S. at this court craves the lord's leave to demiſe, &c. to whom the lord gives leave, &c.*

of the lord in reſpect of his eſtate in the manor, and not in any other collateral reſpect: and therefore the ſteward having a bare authority to execute what the cuſtom of the manor doth warrant, without doubt he cannot *virtute officii* grant any unwarrantable licence to alien by deed, no more than to commit waſte; for the one act as well as the other tendeth to the breach of cuſtom, and both of them, without a ſufficient allowance, amount to the forfeiture of a copyhold: but by expreſs words in the ſteward's patent, or by ſpecial authority given him by the lord, or by ſome particular cuſtom warranting the ſame, the ſteward may in court lawfully licenſe copyholders to alien as well as the lord may. And thus much of the lord.

SECT. XLV.

STEWARD is derived from thoſe two words, *Stede* and *Ward*; and ſo any that doth ſupply another's place, or that is in any employment deputy to another, may according to the true ſenſe of the word be termed a ſteward: as the high ſteward of *England*, becauſe the king appointeth him in divers matters to exerciſe his place; and ſo the under-ſheriff may be termed by the name of the ſheriff's ſteward, being his deputy. And how properly the lord's ſteward is ſo named, any man may judge by this, that the whole authority of the ſteward is derived from the lord as from the head; and not only ſo, but withal he repreſenteth the lord's perſon in many employments: for in the lord's abſence he ſitteth as judge in court to puniſh offences, determine controverſies,

ſies, redreſs injuries, and the like: and farther, ſome things he performeth in the lord's name, and not in his own name, for if the ſteward admitteth any copyholder, or by ſpecial authority or particular cuſtom licenſeth a copyholder to alien, this admittance and licence ſhall be made in the lord's name, and the entry in the court-roll ſhall be, * *Quod dominus per ſeneſcallum admiſit et licenciavit*, and not that the ſteward did admit or licenſe. Therefore ſince the ſteward hath this meaſure of authority and confidence committed unto him, the lord ſhall do very well to be very careful in making choice of his ſteward; for if he be defective in any one of theſe three qualities, knowledge, truſt, or diligence, the lord may be much prejudiced and damnified: therefore ‖ *Fleta* wiſely giveth the lord this counſel, † *Provideat ſibi dominus de Seneſcallo circumſpecto et fideli, qui in legibus conſuetudinibusque provinciæ, et officio Seneſcalciæ ſe cognoſcat, et jura domini ſui in omnibus tueri affectet, quique ballivos domini in ſuis erroribus et ambiguis ſciat inſtruere et docere, quique egenis parcere, et nec prece, vel precio, velit à tramite juſtitiæ deviare, et perverſè judicare.*

* *That the lord admitted and licenſed by the ſteward.*

‖ Lib. 2. cap. 72. p. 159.

† *The lord ſhould provide himſelf with a circumſpect and faithful ſteward, who is knowing in the laws and cuſtoms of the kingdom, and in the office of ſteward; and who will be attentive to defend his lord's rights upon all occaſions, and who knows how to inſtruct and teach the lord's bailiffs whenever they err, or are in any difficulty, and who will be compaſſionate to the poor, and neither by intreaty or bribe, deviate from the path of juſtice, and give an unjuſt ſentence.*

These ſtewards for the moſt part have patents for their offices, yet they may be retained by parol; and this retainer by parol is as effectual in all points before diſcharge, as the moſt effectual inſtitution by patent: for a ſteward thus retained may take ſurrender out of
Co. 4. *fol.* 30. *b.* court, or make voluntary admittances, or any other act incident to the office of a ſteward, as well as a ſteward inſtituted by patent. But in the king's manors a ſteward cannot be retained
Co 4. *fol.* 30. *a.* by parol by the mouth of the auditor or receiver; but to make the ſteward's authority currant, eſpecially to make voluntary admittances, it is neceſſary he have a patent, and then, by virtue of his patent, without any ſpecial authority or particular cuſtom, he may juſtify the making of any voluntary admittance upon eſcheats or forfeitures, or the doing of any act belonging to this office. But though he may *ex officio* do thoſe things without ſpecial warrant, yet duty binds him, before he make any voluntary admittance, to inform the lord treaſurer of *England*, the chancellor, and barons of the *Exchequer*, or any of them, for his better direction, and the king's better benefit. The law is not very curious in examining the imperfections of the ſteward's perſon, nor the unlawfulneſs of his authority; for be he an infant, or *non compos mentis*, an idiot, or lunatick, an outlaw, or an excommunicate, yet what things ſoever he performeth as incident to his place, can never be avoided for any ſuch diſability, becauſe he performeth them as a judge, or at leaſt as cuſtom's inſtrument: and for his authority, though it prove but counterfeit if it come to exact trial, yet if in appear-

ance

ance or outward ſhew it ſeemeth currant, that is ſufficient. As if I grant the ſtewardſhip of my manor of *Dale* by patent, and in the patentee's abſence a ſtranger by my appointment keepeth court, this is authentical. If a grant of a ſtewardſhip be made to one, and for ſome fault or defect in the grant it is avoidable, yet courts kept by him before the avoidance ſhall ſtand in force; and whatſoever he did as ſteward is ever unvoidable. As if a corporation retaineth a ſteward by parol, and he keepeth a court, puniſheth offences, decideth controverſies, taketh ſurrenders, maketh admittances either upon ſurrenders or deſcents; theſe acts being judicial ſhall ever ſtand for currant, though his authority be grounded upon a wrong foundation, for a corporation cannot inſtitute any ſuch officer without writing. And ſo if the king's auditor or receiver retain a ſteward by parol, he may lawfully execute any judicial act; but things which he performeth as cuſtom's inſtrument, nor as judge, ſuch as are voluntary admittances, neither in the retainer by the corporation, not in this retainer by the king's officers, ſhall any whit bind: but if a ſtranger, without the appointment of the lord, or conſent of the right ſteward, or without any colour of authority, will of his own head come into a manor and keep a court; it ſeemeth that the performance of any judicial duty, or the executing of any act whatſoever, will not be warranted, eſpecially if the court be kept without warning given to the bailiff by precept, according to the cuſtom.

The office of a ſteward may be forfeit three manners of ways.

1. By

1. By *Abuſer.*
2. By *Nonuſer.*
3. By *Refuſer.*

1. By *Abuſer.* As if the ſteward burn the court-rolls, or if he taketh a bribe to wink at any offence, or uſe partiality in any cauſe depending before him; theſe and the like abuſes will make him ſubject to a forfeiture.

2. By *Nonuſer.* As if the ſteward by his patent being tied to keep court at certain times of the year, without requeſt to be made by the lord, faileth, and by his failure the lord receive any prejudice, this is a forfeiture. But if the lord be not damnified, then this nonuſer is no forfeiture. As if a parker attends not for the ſpace of three or four days, and no prejudice or damage happeneth in the interim, this is no forfeiture. And in offices which concern the adminiſtration of juſtice, or the commonwealth, the law is more ſtrict than in theſe offices which concern private men: for where an officer *ex officio*, or of neceſſity, ought to attend for the adminiſtration of juſtice, or for the good of the commonwealth, there non-uſer or non-attender in court is forfeiture, though this be prejudicial to no man; as the office of the chamberlain in the *Exchequer*, a protonotary, clerk of the warrants, *exigenter*, *filazer*, or the like in the common pleas; becauſe the attendance of theſe and the like officers is of neceſſity for the adminiſtration of juſtice: ſo the attendance of the clerk of the market is of neceſſity for the good of the commonwealth, and ſo is holding of the ſheriff's tourn, *&c.*

By *Refuſer* the office of a ſteward may be thus forfeited: If the ſteward tied by his patent

tent to keep court upon a demand or requeſt to be made by the lord, if the lord demandeth or requeſteth him to keep a court, and he faileth; this is a forfeiture, though the lord be thereby nothing damnified. And thus much of the ſteward.

SECT. XLVI.

THE underſteward is the ſteward's deputy, and ſometimes appointed by writing, ſometimes by parol: and the extent of his authority is as great as the ſteward's own authority, and his office conſiſteth in performance of the ſelf-ſame duties that the high ſteward himſelf is to perform: only in this point the power of the ſteward goeth beyond the power of the underſteward; that the ſteward can make an admittance out of court, and it ſhall ſtand good, if entry be made in the court-roll, that he that is admitted hath paid his fine and hath done fealty; but the underſteward, though he may take a ſurrender out of the court, yet he cannot make any admittance out of court, without ſpecial authority or particular cuſtom.

Some have thought that an underſteward may be made without ſpecial words in the ſteward's patent authorizing him to make a deputy; but ſurely, ſince it is an office of knowledge, truſt and diſcretion, it cannot, unleſs it be in caſes of neceſſity. As if an office of ſtewardſhip deſcend unto an infant, he may make a deputy, becauſe the law preſumeth he is himſelf uncapable to execute it. So if it be granted to an earl, in reſpect of the exility of the office in a baſe court, and of the dignity of

the perſon, who is * *præpoſitus comitatûs*, and had in ancient time the charge and cuſtody of the whole ſhire, whoſe attendance the law intendeth to be moſt neceſſary upon the king and the commonwealth: therefore it is implied in law, for the conveniency, that he may make a deputy, for whom he ought to anſwer. This is one obſervation touching underſtewards: In admittances made by underſtewards, as well as in admittances made by the ſtewards themſelves, it is good order to expreſs in the copy and in the court-roll the name of the underſteward or the ſteward; becauſe in pleading any admittance a man muſt ſay that he was admitted by ſuch a one underſteward or ſteward, naming his name. And this ſhall ſuffice touching the manner and means of granting copyholds. Suffer me now in the fourth place to point at the ſeveral eſtates of copyholders, together with their ſeveral qualities incident to their ſeveral eſtates.

SECT. XLVII.

ALL eſtates whatſoever may be reduced to one of theſe three heads:

1. Inheritance,
2. Frank-tenant,
3. Chattels.

All *inheritances* are of two ſorts; either fee-ſimples, or fee-tails.

Of *fee-ſimples* ſome are determinable, ſome are undeterminable.

* *Warden of the county.*

Determinable, as where land is given to a man and his heirs for ſo long time as *Paul*'s ſteeple ſhall ſtand.

Undeterminable, as where land is given to a man and his heirs without farther limitation.

Of *fee-tails* ſome are general, ſome are ſpecial.

General, as where land is given to a man and the heirs of his body, or heirs males or females of his body.

Special, as where land is given to a man and the heirs, males or females, which he ſhall beget of ſuch a woman.

All *frank-tenants* are of two ſorts; either created by the act of the party, or by the act of the law.

Of frank-tenants created by the act of the party, ſome are determinable by death, ſome by collateral means.

By death, as eſtates granted, during the life of the grantor, of the grantee, or of a ſtranger.

By collateral means, as eſtates granted * *quamdiu fuerit innupta*; to a widow, † *quamdiu remanſerit vidua*; or to a miniſter, ‡ *quamdiu ſacerdotium exercuerit*.

Of frank-tenants created by the act of the law, ſome are frank-tenants *ſimpliciter*, ſome *ſecundùm quid*. *Simpliciter*, as the eſtates of a tenant in dower, of a tenant by the courteſy, of an occupant, a tenant in tail after poſſibility of iſſue extinct. *Secundùm quid*, as the eſtates of a tenant by ſtatute merchant, ſtatute

* *As long as ſhe ſhall be unmarried.*
† *As long as ſhe ſhall remain a widow.*
‡ *As long as he ſhall exerciſe the office of a prieſt.*

ſtaple,

ſtaple, and *elegit*; who though they are to have the land but for ſo many years as will give a plenary ſatisfaction to their debts, yet by the ſtatute of *Weſtminſter* 2. they may maintain an aſſiſe, which no other tenant having but a chattel can have.

All *chattels* are either certain, or incertain. Of chattels certain, ſome are in themſelves certain, ſome are made certain by relation to a certainty. Certain in themſelves, as where lands are granted for 20, 30, or 40 years. Certain by relation to a certainty, as where land is granted for ſo many years as *J. S.* hath acres of land.

Of incertain chattels, ſome are incertain in their commencement, ſome incertain in their determination.

In their commencement; as where a guardian hath an eſtate during the minority of a heir.

All theſe eſtates, either by the general or by the particular cuſtoms of manors, are of copyholds as well as of freeholds: in what manner
Co. 4. *fol.* 23. ſoever an eſtate in fee-ſimple is warranted by the cuſtom, moſt inferior eſtates are by implication likewiſe warranted. All frank-tenants created by the act of the party, the eſtate of an occupant, and all chattels whatſoever, without any other particular cuſtom, are hereby warranted.

But the law is otherwiſe of eſtates in dower,
Co. 4. *fol.* 22. *a.* by the courteſy, by ſtatute merchant, ſtatute ſtaple, or *elegit*: for as long as ſuch a copyhold, by the cuſtom of the manor grantable in fee-ſimple, continueth in the copyholder's hands, it is not liable to any of theſe eſtates; but

but if once it cometh to the lord by eſcheat, forfeiture, or by other means, ſo long as it remaineth reunited to the manor, it is in the nature of a freehold, and ſhall be ſubject to the charges and incumbrances as land at the Common law. And howſoever by implication theſe eſtates are not allowed in copyholds continuing in the copyhold poſſeſſion; yet by particular cuſtom the wife may be tenant in dower, the huſband tenant by the curteſy, a ſtranger tenant by ſtatute merchant, ſtatute ſtaple, or *elegit*, of a copyhold, reſting in the copyhold, as well as if it reſted in the lord. Whether an eſtate-tail, or an eſtate-tail after poſſibility of iſſue extinct, which hath a neceſſary depending upon an eſtate-tail, may by any particular cuſtom be allowed, that I may diſpute, but cannot determine; for it is *vexata quæſtio*, much controverted, but nothing concluded. I will briefly touch the reaſons alledged on both ſides. They which are againſt the validity of intails by ſpecial cuſtom do chiefly urge theſe two reaſons: that no eſtates-tail were before the *ſtat. de donis conditionalibus*, but all inheritances were fees conditional; and the ſtatute being made 13 *E.* 1. which is within the memory of man, it cannot be that any ſpecial cuſtoms have my commencement ſince the ſtatute; for then a cuſtom might begin within time of memory, which is altogether repugnant to the rules of cuſtom.

Two great inconveniencies would enſue if a copyholder might be intailed by ſpecial cuſtom, becauſe neither fine nor common recovery can bar it; ſo that he hath ſuch an eſtate, that he cannot of himſelf, without the aſſent of the lord,

lord, diſpoſe of it either for the payment of his debts, for the advancement of his wife, or preferment of his younger ſons.

SECT. XLVIII.

THE main reaſons inſiſted upon in defence of intailing copyholds are theſe.

1. In divers manors they have been from time to time not only reputed as tenants in tail, but in every man's mouth termed by that name.

2. A formedon in the deſcender lieth of a copyholder, which writ none can bring but tenant in tail.

3. A remainder limited upon ſuch an eſtate in ſuch manors hath been allowed, and therefore is no fee conditional; for upon a fee, whether abſolute or conditional, a render can by no means depend.

4. It is a common uſage there by a recovery to dock intails of copyhold, or to defeat theſe eſtates by preſentment that the copyholder hath committed a forfeiture, and ſo the lord to ſeiſe, and then to ſurrender it to the purchaſer: and therefore there is not that inconvenience which is ſuppoſed in the copyhold, *ſcilicet*, want of power to diſpoſe of ſuch an eſtate without the lord's conſent.

5. Much inconvenience would depend upon this, if copyholds might not be intailed; for it would tend to the ſubverſion and deſtruction of many mens eſtates, which from time to time they have enjoyed without contradiction: and therefore for the quiet of the commonwealth

wealth, how neceſſary it is that copyholds ſhould be intailed, let any man judge.

Thus much of the ſeveral eſtates of the copyhold: a word of their ſeveral qualities incident to ſeveral eſtates.

SECT. XLIX.

WHAT qualities ſoever are neceſſarily incident to eſtates at the Common law, are incident to eſtates by cuſtom. In illuſtrating this I will confine myſelf to the diſcuſſing of theſe two points.

1. What words will create copyholds of inheritance, and what copyholds of frank-tenant.

2. How copyholds of inheritance ſhall deſcend.

Touching their creation, copyholds of inheritance and copyholds of frank-tenement are created by the ſame words that inheritance and frank-tenement at the Common law are created by. Co. 4. *fol.* 29.

If a copyhold be granted to a man and to his heirs males, or heirs females; if to a man * *et ſanguini ſuo hæreditabili*; if to a dean and chapter, or to a mayor and commonalty, without any expreſs eſtate, or without a limitation of ſome inferior eſtate: in all theſe grants a perfect eſtate in fee paſſeth.

And ſo peradventure if I ſurrender a copyhold to a man and his heirs, and he, reciting this eſtate, reſurrendereth in the ſame manner to me that I ſurrendered to him, not making any mention of my heir; yet this recital ſeemeth ſufficient to paſs a good fee-ſimple.

* *And to his inheritable blood.*

So if I ſurrender unto you as large an eſtate as *J. S.* hath in his manor of *D.* and he hath a fee-ſimple in his manor; it is ſomewhat probable that an eſtate in fee-ſimple ſhould paſs, by reaſon of his relation, without the word *heirs*.

If a copyhold be ſurrendered to a man * *et ſemini ſuo hæreditabili de corpore*; or to a man † *et hæredibus ex ipſo procreatis*, or to a man in frank-marriage with his wife; in theſe grants an eſtate-tail paſſeth in the firſt without the word *heirs*, in the ſecond without the word *body*, in the third without either.

If the king by his ſteward granteth a copyhold to a man and to his heirs-males, or heirs-females; no fee-ſimple paſſeth, becauſe the lord never intended to paſs ſuch an eſtate.

If a copyhold be granted to an abbot and to his heirs, an eſtate for life only paſſeth.

So if I grant a copyhold to a man in fee-ſimple ‡ *ac ſanguini ſuo in perpetuum*, or § *ſibi & aſſign. ſuis in perpetuum*; yet the word heirs wanting, no greater eſtate than for life paſſeth.

The ſame law is, if a copyhold be granted to a man and to his heirs as long as *J. S.* ſhall live; this is only an eſtate ** *pur autre vie*, and a render limited upon this eſtate is good.

But if a copyhold be granted to a man and to his heirs as long as ſuch a tree ſhall grow in ſuch a ground; this is a good fee, and a render limited upon it is void.

* *And to the inheritable ſeed of his body.*
† *And to the heirs begotten by him.*
‡ *And to his blood for ever.*
§ *To him and his aſſigns for ever.*
** *For another's life.*

If

If a copyhold be granted to *J. S.* and *J. N.* † *et hæredibus*, they are joint-tenants for life; and no inheritance paſſeth unto either, becauſe of the uncertainty for want of this word ‡ *ſuis*: but if a copyhold be granted to *J. S.* only † *et hæredibus*, a good fee-ſimple paſſeth without the word ‡ *ſuis*.

If a copyhold be granted to a man † *et hæredibus*, an eſtate-tail doth not paſs, for want of the words § *de corpore*. And if a copyhold be granted to a man ** *et liberis aut pueris ſuis de corpore*; an eſtate-tail doth not paſs, for want of this word *heirs*: for what eſtates ſoever are intails ſince the ſtatute †† *de donis conditionalibus* were fee-ſimples conditional; but this could be no fee-ſimple conditional before the ſtatute, without the word *heirs*, and therefore no intail ſince the ſtatute. And for the ſame reaſon, if a copyhold be granted to a man and to the iſſues males of his body, an eſtate for life only paſſeth.

If a copyhold begranted to a man, without expreſſing any certain eſtate by implication of law, an eſtate for life only paſſeth: and if I grant a copyhold to three ‡‡ *habendum ſucceſſivè*, they are joint-tenants, unleſs by ſpecial cuſtom the word *ſucceſſivly* make their eſtates ſeveral. Thus much touching the creation of copyhold eſtates.

† *And heirs.* ‡ *His.* § *Of his body.*
** *And to his children or iſſue of his body.*
†† *Of conditional gifts.*
‡‡ *To hold ſucceſſively.*

SECT. L.

THE deſcents of copyhold of inheritance are guided and directed by the rules of the Common law, as well as the creation of copyhold eſtates.

If a copyholder in fee-ſimple, having iſſue a ſon and a daughter by one venter, and a ſon by another venter dieth, and the ſon by the firſt venter entereth and dieth, the land ſhall deſcend to the daughter; * *Quia poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem.*

But if a copyholder in tail have iſſue a ſon and a daughter by one venter, and a ſon by another venter, and dieth, and the ſon by the firſt venter entereth and dieth; the ſon of the ſecond venter ſhall inherit.

If a man have iſſue a ſon and a daughter by one venter, and a ſon by another venter, the eldeſt ſon purchaſeth a copyhold in fee, and dieth without iſſue; the daughter ſhall have the land, not the younger ſon, becauſe he is but of the half blood to the other.

If a man hath a copyhold by deſcent from his mother's ſide, if he die without iſſue, the land ſhall go to the heirs of the mother's ſide, and ſhall rather eſcheat than go the heirs of the father's ſide: but if I purchaſe a copyhold, and die without iſſue, the land ſhall go to the heirs of my father's ſide; but if I have no heirs of my father's ſide, it ſhall go to the heirs of my mother's ſide, rather than eſcheat.

* *Becauſe the brother's poſſeſſion of a fee-ſimple, makes the ſiſter heir.*

If

If there be father, uncle and ſon, and the ſon purchaſeth a copyhold in fee, and dieth without iſſue; the uncle ſhall inherit, and not the father, becauſe an inheritance may lineally deſcend, but not aſcend.

If there be three brothers, and the middle brother purchaſeth a copyhold in fee, and dieth without iſſue; the eldeſt ſhall inherit, becauſe the worthieſt of blood.

If there be two coparceners or two tenants in common of a copyhold, and one dieth having iſſue; the iſſue ſhall inherit, and not the other by the ſurvivorſhip: but otherwiſe it is of two joint-tenants. Should I give way to my pen, and write of this theme till I wanted matter to write on, I ſhould make a large volume in dilating this one point; therefore I will contract myſelf, intreating you to ſupply by your private cogitations what I have either willingly or unwittingly paſſed over in ſilence, only take this caveat by the way.

Though all qualities neceſſarily incident to eſtates at the Common law are likewiſe incident to copyhold eſtates; yet the law is not ſo of collateral qualities without ſpecial cuſtom; and therefore a copyhold ſhall be no aſſets to the heir. Co. 4. *fol.* 22. *a.*

A deſcent of a copyhold ſhall not toll an entry. A ſurrender made by tenant in tail (admit a copyhold may be intailed) or by a baron of a copyhold, which he hath in right of his wife, ſhall make no diſcontinuance; becauſe theſe are collateral qualities, and not neceſſarily incident.

Thus much of the ſeveral eſtates of copyholds, together with their ſeveral qualities incident

cident to their ſeveral eſtates. I come now in the fifth place to examine how copyholders are to implead and be impleaded.

SECT. LI.

A COPYHOLDER cannot in any action real, or that ſavoureth of the realty, or hath a dependance upon the realty, implead or be impleaded in any other court but the lord's court for or concerning his copyhold: but in actions that are meerly perſonal he may ſue or be ſued at the Common law.

If a copyholder be ouſted of his copyhold by a ſtranger, he cannot implead him by the king's writ, but by plaint in the lord's court, and ſhall make proteſtation to proſecute the ſuit in the nature of an aſſiſe of novel diſſeiſin, of an aſſiſe of mortdanceſtor, of a formedon in the deſcender, reverſer, or remainder, or in the nature of any other writ, as his cauſe ſhall require, and ſhall put in *Pleg. de proſequend'*.

If a copyholder be ouſted by the lord, he cannot maintain an aſſiſe at the Common law, becauſe he wanteth a frank-tenant; but he may have an action of treſpaſs againſt him at the Common law: for it is againſt reaſon, that the lord ſhould be judge where he himſelf is a party.

If in a plaint in the lord's court touching the title of a copyholder, the lord giveth falſe judgment, he cannot maintain a writ of falſe judgment; for then he ſhould be reſtored to a frank-tenant, where he loſt none.

No copyholder of baſe tenure in ancient demeſne can maintain a writ of *Droit cloſe*, or a writ

a writ of *Mauſtraverunt*: but tenants of frank-tenure in ancient demeſne can.

A copyholder that may cut down timber-trees by cuſtom, by licence of the lord maketh a leaſe for years, the leſſee cutteth down trees; the copyholder ſhall not have a writ of waſte, but ſhall ſue at the lord's court to puniſh this waſte.

If a feme dowable by cuſtom of a copyhold by plaint in the lord's court recovereth dower and damages, no action of debt lieth at the Common law for theſe damages, becauſe the action, though it be in itſelf perſonal, yet it dependeth upon the realty.

If a copyholder maketh a leaſe by copy for years, or by deed with licence, an action of debt lieth for the rent reſerved upon either leaſe at the Common law: but I much doubt whether he can avow for the rent either in the one or in the other, any more than *Ceſtuy que uſe*, before the ſtatute 27 *H.* 8. *cap.* 10. could avow for the rent reſerved by him upon a leaſe for years, and yet he could maintain an action of debt for ſuch a rent, becauſe an action of debt is grounded upon the contract.

If a ſtranger cut down trees growing in the copyhold ground, an action of treſpaſs lieth at the Common law againſt him: ſo doth it againſt the lord, where he cutteth them down when by cuſtom they belong to the tenant; becauſe this is a mere perſonal action, and damages only are to be recovered.

And if a copyholder without licence maketh a leaſe for one year, or with licence maketh a leaſe for many years, and the leſſee be ejected; he ſhall not ſue in the lord's court by

plaint, but ſhall have an *ejectio firmæ* at the Common law, becauſe he hath not a cuſtomary eſtate by copy, but a warrantable eſtate by the rules of the Common law. Thus much of the manor how copyholders are to implead and be impleaded.

SECT. LII.

I COME now, in the ſixth place, to ſhew under what ſtatutes copyholders are comprehended. Copyholders are comprehended under ſtatute, either by expreſs limitation in preciſe words, or by a ſecret implication upon general words.

By expreſs limitation in preciſe words: As by the ſtatute of 1 *R.* 3. *cap.* 4. it is expreſly provided, that a copyholder, having copyhold land to the yearly value of twenty-ſix ſhillings and ſix pence above all charges, may be impanelled upon a jury as well as he that hath twenty ſhillings *per annum* of freehold land.

So by the ſtatute of 1 *E.* 6. *cap.* 14. it is expreſly provided, that upon the diſſolution of abbies and monaſteries copyholds ſhould continue as they did before the ſtatute, and ſhould fall into the king's hands.

So by the ſtatute of 2 *E.* 6. *cap.* 8. it is expreſly provided, that the intereſt of a copyhold ſhould be preſerved, notwithſtanding it be not found by office after the deceaſe of the king's tenant.

So by the ſtatute of 1 *Mar.* *cap.* 12. it is expreſly provided, that if any copyholder being yeoman, artificer, huſbandman, or labourer, and being of the age of eighteen or more,

under the age of ſixty, not ſick, impotent, lame, maimed, nor having any other juſt or reaſonable cauſe of excuſe, upon requeſt made by any man in authority, refuſeth to aid juſtices in ſuppreſſing of riotous perſons; that then immediately he ſhall forfeit his copyhold to the lord of whom it is held during the copyholder's natural life.

So by the ſtatute of 5 *Eliz. cap.* 14. it is expreſly provided, that the forging of a court-roll, to the intent to defraud a copyholder, ſhall be as well puniſhable as the forging any other charter, deed, or writing ſealed, whereby to defeat a copyholder or freeholder.

So by the ſtatute of 13 *Eliz. cap.* 7. it is expreſly provided, that the copyhold land as well as the freehold land of a bankrupt ſhall be ſold for the ſatisfying of the creditor.

So by the ſtatute of 14 *Eliz. cap.* 6. it is expreſly provided, that if any of the queen's ſubjects goeth beyond the ſeas without licence, that then the queen ſhall not only take the ordinary profits of the fugitives copyhold land as they ariſe, but ſhall let, ſet, and make grants by copy, and uſual woodſales, and other things, to all intents and purpoſes as a tenant * *pro term. durante vitâ* may do.

So by the ſtatute of 35 *Eliz. cap.* 2. it is expreſly provided, that if any perſon or perſons being convicted of recuſancy repair not home to their uſual place of abode, not removing from thence above five miles diſtance, that then any perſon or perſons thus offending ſhall not only forfeit their freehold land to the

* *For term of his life may do.*

queen,

queen, but withal their copyhold land to the lord or lords of whom it is holden.

Thus have I ſhewed in brief under what ſtatutes copyholders are comprehended by expreſs limitation in preciſe words. Now I will ſhew you as briefly as I can under what ſtatutes they are comprehended by ſecret implication upon general words.

SECT. LIII.

SOME hold that all ſtatutes that ſpeak generally of tenants extend to tenants by copy: but it is much to be feared that we ſhall wander from the truth, if we give credit to this conceit; for if we peruſe the ſtatutes, we ſhall meet with an infinite number of them that ſpeak generally of tenants and yet touch not tenants by copy: wherefore not giving way to this opinion, as being erroneous, I will ſet you down an infallible rule, which will truly direct you in the expoſition of the general words in ſtatutes; and that is thus.

Co. 3. *fol.* 8. When an act in parliament altereth the ſervice, tenure or intereſt of the land, or other thing in prejudice of the lord, or of the cuſtom of the manor, or in prejudice of the tenant, there the general words of ſuch an act in parliament extend not to the copyhold: but when an act is generally made for the good of the commonwealth, and no prejudice may accrue by reaſon of the alteration of any intereſt, ſervice, tenure or cuſtom of the manor, there uſually copyholds are within the general purview of ſuch acts.

The

The ſtatute of *Weſtm.* 2. *cap.* 1. of intails extendeth not to copyholds, becauſe it would be prejudicial to the lord; for by this means the tenure is altered: for the donee in tail, without any ſpecial reſervation, ought to hold of the donor by the ſame ſervice that the donor holdeth over. Beſides, the words of the ſtatute are, *Quod voluntas donator. in charta domini ſui manifeſtè expreſſa de cætero obſervetur*; which proveth, that the intent of the ſtatute was that no hereditament ſhould be intailed within this ſtatute, but ſuch an one as either was given, or at leaſt may be given, by charter of deed; but copyholds are no ſuch hereditaments, and therefore not within the body of the act. Yet is is holden, that cuſtom with the cooperation of the ſtatute will make an eſtate-tail.

The ſtatute of * *W.* 2. *cap.* 20. which giveth the *Elegit*, extendeth not to copyhold, becauſe it would be prejudicial to the lord, and a breach of the cuſtom, that any ſtranger ſhould have intereſt in the lands holden by copy, without the admittance and ordinary allowance of the lord.

The ſtatute of 16 *R.* 2. *cap.* 5. which maketh it a forfeiture of lands, tenements and hereditaments to the purchaſor of excommunication, bulls, *&c.* in the court of *Rome* againſt the king, *&c.* extendeth not to copyhold; becauſe it would be prejudicial to the

* Sav. 67. pl. 138. Rol. Abr. 888. Cro. Car. 44. Hardr. 433. Old Benl. 163. 3 Co. Rep. 9. 6 Vin. Abr. 169. pl. 4. 3 Read. Stat. Law 123. 2 Inſt. 396. Gilb. Ten. 185. Suppl. to Cooke's Compl. Copyhold. 103.

lord

lord to have the king ſo far intereſted in his copyhold without his conſent.

The ſtatute of 2 *H.* 5. *cap.* 7. of hereticks extends not to copyholds: for though the lord of a manor is yearly to receive a benefit, in having the lands after the year and the day forfeited unto him; yet becauſe the king is a ſharer in this forfeiture, therefore lands by copy are not comprehended under the general words: beſides, the ſtatute ſpeaketh of the king's having * *annum, diem et vaſtum* of theſe lands forfeited for hereſy, as in lands forfeited for felony; whereby it appeareth that the meaning of the ſtatute is, that ſuch lands only ſhould be forfeited in which the king by the ordinary courſe of the law ſhould have * *annum, diem et vaſtum*, if the tenant of them had committed felony; but ſuch lands are not lands by copy, for if a copyholder committeth felony, his copyhold is preſently forfeited to the Lord. Therefore copyholds are out of the general purview of this ſtatute.

SECT. LIV.

THE ſtatute of 27 *H.* 8. *cap.* 10. of uſes toucheth not copyholds, becauſe the tranſmutation of poſſeſſion by the ſole operation of the ſtatute, without allowance of the lord or the agreement of the tenant, would tend to the prejudice both of the lord and of the tenant: and the branch of the ſame ſtatute which ſpeaketh of jointures toucheth not copyholds, becauſe dowers of copyholds are warranted

* *The year, day, and waſte.*

ranted by ſpecial cuſtom only, and not by the Common law, or by the general cuſtom.

The ſtatute of 31 *H.* 8. *cap.* 1. and 32 *H.* 8. *cap.* 32. by which joint-tenants and tenants in common are compellable to make partition by a writ * *de partitione facienda*, as copartners at the Common law, touch not copyholds; becauſe this alteration of the tenure without the lord's conſent may ſound to the prejudice of the lord.

The ſtatute of 32 *H.* 8. *cap.* 28. which confirmeth leaſes for 21 years or three lives made by tenants in tail, or by the huſband and wife of the lands of the wife, toucheth not copyhold: for the ſtatute ſpeaketh of leaſes made by deed only, ſo that the intent of the ſtatute is to warrant the leaſing of ſuch lands only as are grantable by deed, but ſuch are not copyhold lands: for though they may by licence of the lord be demiſed by indenture, yet in their own name they are demiſable only by copy, and therefore out of the general purview of the ſtatute. For the ſame reaſon the ſame ſtatute *cap.* 34. which giveth an entry to the grantee of a reverſion upon the breach of a condition by the particular tenant, toucheth not copyholds.

SECT. LV.

THE ſtatute of 17 *E.* 2. *cap.* 10. which giveth the wardſhips of idiots land unto the king, toucheth not the idiots copyhold; for thereby great prejudice would accrue to the lord.

* *For making partition.*

But

Co. 4. *fol.* 30. *b.* But the ſtatute of *Merton*, *cap.* 1. which giveth damages to a feme upon a recovery in a writ of dower, where the baron dieth ſeiſed, extendeth to copyhold.

So that the ſtatute of *Weſtm.* 2. *cap.* 3. and the three ſeveral branches of the ſame ſtatute, 1. the one, which giveth the *cui in vita* upon a diſcontinuance made by the baron, 2. the ſecond, which giveth the receit unto the feme upon the baron's refuſal to defend the wife's title, 3. and the third, which giveth a *quod ei deforceat* to particular tenants, extends to copyhold.

So that the ſtatute of 31 *H.* 8. *cap.* 13. of Monaſter. which provideth for the avoidance of doubling of eſtates, and the ſtatute 32 *H.* 8. *cap.* 9. againſt champerty, and buying of litigious titles, and *cap.* 28. which giveth an entry in lieu of a *cui in vita*, extend all to copyholds; becauſe theſe ſtatutes are beneficial to the commonwealth, and not at all prejudicial to the lord in the alteration of tenure, eſtate, ſervice, *&c.*

Co. 4. *fol.* 26.

So the ſtatute of 4 *H.* 7. *cap.* 24. of fines extendeth to copyholds; for if a copyholder be diſſeiſed, and the diſſeiſor levieth a fine with proclamations, and five years paſs without any claim made, this is a bar both to the lord and to the copyholder.

So if a copyholder make a feoffment in fee, and the feoffee levieth a fine with proclamation, and five years paſs, the lord is barred: but if a copyholder levy a fine, and five years paſs, the lord is not barred, for the fine levied, the copyhold, having no frank-tenant, is utterly void. And whereas it has been doubted that

that this ſtatute ſhould not extend to copyhold, but the lord ſhould hereby receive grand prejudice; for he ſhould not only loſe the fines upon alienations or deſcents, and the benefit of forfeiture, but ſhould withal be in hazard to be barred of his frank-tenant and inheritance: To that I anſwer; if the lord receive any ſuch prejudice, it is through his own default, for not making claim, for in regard of the privity in eſtate that is between him and the copyholder he may make claim as well as the copyholder himſelf: * *Et vigilantibus non dormientibus jura ſubveniunt.* Co. 4. *fol.* 105. 1.

Thus have I ſhewed under what ſtatutes copyholds are comprehended, I come now in the ſeventh place to ſpeak of Fines.

SECT. LVI.

A *FINE* is a ſum of money paid to the lord of the manor for an income into any lands or tenements. In ſome manors fines are certain, in ſome incertain.

By ſpecial cuſtom copyholders are to pay fines upon licences granted unto them to demiſe by indenture; but by general cuſtom they are to pay fines only upon admittances.

If the lord having a copyhold by eſcheat, forfeiture, or other means, maketh a voluntary admittance, a fine is due unto the lord.

If a copyholder ſurrendereth to the uſe of a ſtranger, and the lord admitteth, a fine is due to the lord.

* *And the laws aſſiſt thoſe who watch, not thoſe who ſleep.*

So if a copyhold deſcendeth, and the lord admitteth the heir, where by the cuſtom of the manor the wife is to have dower, and the huſband is to be tenant by the curteſy of a copyhold; either of them ſhall be admitted, and ſhall pay a fine to the lord.

If a copyhold be granted * *durante vitâ*, and the grantee dieth, living *ceſtuy que vie*, and a ſtranger entereth as a general occupant; he ſhall be admitted, and ſhall pay a fine.

And ſo if a copyhold be granted to one and his heirs * *durante vitâ*, and the grantee dieth, and his heir entereth as a ſpecial occupant, where by the cuſtom of the manor a copyhold may be extended; upon the extent the party ſhall be admitted, and ſhall pay a fine.

Where, by the cuſtom of the manor, the bailiff of the manor is to have the wardſhip of the copyhold heir being under the age of fourteen, ſuch a guardian ſhall neither be admitted, nor pay a fine, becauſe he is but a partner of the profits, and that not in his own right, but in the right of him to whom he is guardian.

If the copyhold lands of a bankrupt be ſold according to the ſtatute of the 13 *Eliz. cap.* 7. the vendee ſhall be admitted, and pay a fine. *Gen. Syſt. of Bank.* 89.

If a villian purchaſeth a copyhold, the lord of the villain may enter and ſeiſe it, and the lord of the manor ſhall admit him, and have a fine.

If a copyhold be granted upon condition, and the condition be broken, and the grantor

* *During life.*

entereth,

entereth, he ſhall not be admitted, neither pay a fine; becauſe upon the breach of the condition and the entry, he is to all intents in * *ſtatu quo priùs*, as if no grant at all had been made.

If a copyholder in fee ſurrendereth for life, reſerving the reverſion, and the leſſee for life dieth; the copyholder ſhall not be admitted to his reverſion, neither ſhall he pay a fine, becauſe the reverſion was never out of him.

If a copyholder be diſſeiſed, and then entereth upon the diſſeiſor, or recovereth by plaint in the nature of an aſſiſe, he ſhall not be admitted, neither ſhall he pay a fine; for he continueth ſtill tenant by copy, notwithſtanding the diſſeiſin: but where by a plaint a copyhold is recovered upon the accruer of a new title, where he that recovereth was never admitted nor paid fine; there upon his recovery an admittance is requiſite, and a fine is due: as if a copyholder dieth ſeiſed, a ſtranger abateth, and the heir recovereth by plaint in the nature of an aſſiſe of *Mortdanceſtor*, upon this recovery he ſhall be admitted, and pay a fine.

If I take a wife with a copyhold in fee, tho' by this intermarriage there accrueth a preſent intereſt to me; yet becauſe I am ſeiſed not † *jure proprio*, but ‡ *jure alieno*, therefore I ſhall not be admitted, neither ſhall I pay a fine.

The ſame law is, if ſhe be a termor of a copyhold: for though the term by the intermarriage be ſo veſted in me that I may diſpoſe of it without controul; yet becauſe before *Vid.* Plowden *Com.* 418. *b.*

* *His former ſtate.* † *In my own right.*
‡ *In another's right.*

diſpoſer I am poſſeſſed of it but in the right of my wife, therefore I ſhall neither be admitted, nor pay a fine.

If a copyhold be ſurrendered for life, the remainder to a ſtranger; though the admittance of tenant for life be ſufficient to inveſt the eſtate in him in the remainder, yet upon the death of tenant for life, he in the remainder ſhall be admitted, and pay a fine.

So if a copyhold be granted to three * *habend. ſucceſſivè*, where by cuſtom ſucceſſion is in force; if any one dieth, he that next ſucceedeth ſhall be admitted, and pay a fine.

If two copartners or tenants in common of a copyhold be, and the one dieth, and the other hath all by deſcent; he ſhall be admitted, and ſhall pay a fine. But if two joint-tenants be of a copyhold, and one dieth; the other ſhall have all by the ſurvivorſhip without admittance, or paying fine, becauſe joint-tenants to all intents and purpoſes are ſeiſed *per my et per tout.*

If two ſeveral copyholders join in a grant of their copyhold by one copy; or if one copyholder, having ſeveral copyholds, granteth them by one copy; yet the grantee ſhall pay ſeveral fines, for they ſhall inure as ſeveral grants.

But if two joint-tenants, two tenants in common, or tenant for life and he in the remainder join in the grant of a copyhold; one fine only is due, and it ſhall inure as one grant only: ſo if a ſurrender be made, and after a common recovery is had by plaint in the nature of

Co. 4. *fol.* 27. *b.*

* *To hold ſucceſſively.*

a writ

a writ of entry *in le poſt*, for the better aſſurance, one fine only ſhall be paid.

And thus much of fines. I come now in the next place to *Forfeitures*: wherein I will chiefly rely upon theſe four points.

1. What acts amount to a forfeiture.
2. What perſons are able to forfeit.
3. What perſons are able to take benefit of a forfeiture,
4. What acts amount to a confirmation of an eſtate forfeit.

SECT. LVII.

OF acts which amount to forfeiture, ſome are forfeits * *eo inſtante* that they are committed, ſome are not forfeits till preſentment. Offences which are apparent and notorious, of which the lord by common preſumption cannot chuſe but have notice, are forfeitures * *eo inſtante* that they are committed: as if by ſpecial cuſtom, upon the deſcent of any copyhold of inheritance, the heir is tied upon three ſolemn proclamations, made at three ſeveral courts, to come in and be admitted to his copyhold; if he faileth to come, in this failure is a forfeiture † *ipſo facto.*

So if a copyholder be ſufficiently warned to appear, and he faileth; this is a forfeiture † *ipſo facto.*

But if he be hindered by ſickneſs, or by overflowing of waters, or if he be much in debt, and fear to be arreſted, or if he be a bankrupt, and keepeth his houſe; then his default is no forfeiture.

* *Inſtantly.* † *Immediately.*

If a copyholder in the court be called and ſummoned to be ſworn of the homage, and refuſeth; this is a forfeiture * *ipſo facto.*

So if a copyholder be ſworn of the homage, and then refuſeth to preſent the articles according to his oath; this is a forfeiture * *ipſo facto.*

So if a copyholder will ſwear in court that he is none of the lord's copyholder; this is a forfeiture * *ipſo facto.*

But if a copyholder in preſence of the court ſpeaketh unreverent words of the lord, as that the lord exacteth and extorteth unreaſonable fines and undue ſervices; this is fineably only, but no forfeiture; and if he ſaith in court, that he will deviſe a means no longer to be the lord's copyholder, this is neither cauſe of fine nor forfeiture; for peradventure the means that he intended was lawful, *viz.* by paſſing away his copyhold. † *Et ubi ſenſus verborum eſt multiplex, verba ſemper ſunt accipienda in meliori ſenſu.*

If the ſteward ſheweth a court-roll to a copyholder, to prove that his land is holden by copy, and the copyholder ſaith he is a freeholder, and ſheweth a deed, pretending thereby to procure his land to be freehold, and teareth in pieces the court-roll; this is a forfeiture * *ipſo facto.*

So if the lord, upon the admittance of a copyholder, the fine by the cuſtom of the manor being certain, demandeth his fine, and the copyholder denieth to pay it upon demand; this is a forfeiture * *ipſo facto.*

Co. 4. *fol.* 27. *b.*

* *Immediately.*

† *And where the ſenſe of the words is manifold, they are always to be taken in the milder ſenſe.*

So

So if a copyholder will ſue a replevin againſt the lord, upon the lord's lawful diſtreſs for his rent or ſervices; this is a forfeiture * *ipſo facto.*

But if the copyholder be in doubt whether it be due or not, and therefore intreateth the lord that the homage may inquire the truth; this is no forfeiture.

If the fine by the cuſtom of the manor be incertain, though a reaſonable fine be aſſeſſed, yet becauſe no man can provide for an incertainty, the copyholder is not bound to pay it preſently upon demand, but ſhall have convenient time to diſcharge it, if the lord limit no certain day for payment thereof; and if within convenient time it be not diſcharged, this is a forfeiture without preſentment.

But if the fine be unreaſonable, though it be never paid, it is no forfeiture; and it ſhall be determined by the opinion of the juſtices before whom the matter dependeth, either upon a demurrer, or in evidence to the jury, upon the confeſſion or proof of the yearly value of the land, whether the fine be reaſonable or not: for if the lords might aſſeſs unreaſonable fines at their pleaſures, then moſt eſtates by copy, which are a great part of the kingdom, and which have continued time out of mind, might now at the will of the lords be defeated and deſtroyed, which would be very inconvenient.

If the lord demandeth his rent, and the copyholder denieth to pay it; this is a forfeiture * *ipſo facto.*

So if the copyholder ſaith, that he wanteth money to diſcharge the rent, and therefore in-

* *Immediately.*

treateth the lord to forbear until he be better provided; unleſs the lord giveth his conſent, this non-payment is a forfeiture * *ipſo facto.*

For a copyholder, knowing his day of payment, is to provide againſt the day. But if the lord cometh upon the copyholder's ground, and demandeth his rent, and neither the copyholder himſelf, nor any other by his appointment, is there preſent to anſwer their demand, though this be a denial in law of the rent, yet this is no forfeiture.

But if the lord continueth in making demand upon the ground, and the copyholder is ſtill abſent; this continual denial in law amounteth to a denial in fact, and maketh the copyholder's eſtate ſubject to a forfeiture without preſentment.

If a copyholder for life ſuffereth a recovery by plaint in the lord's court as copyhold of the inheritance, this is a forfeiture * *ipſo facto.*

But if he ſurrender in fee, this is no forfeiture, becauſe it did not paſs by livery.

If a copyholder committeth waſte voluntary or permiſſive, this is a forfeiture * *ipſo facto.*

Voluntary: As if he plucketh down any ancient built houſe, or if he buildeth any new houſe, and then pulleth it down again; or if he ploweth meadow, ſo that thereby the ground is made worſe; or loppeth the trees, or ſelleth the lopping; or if he cutteth down any fruit-trees for fuel, having other wood ſufficient; theſe and the like voluntary waſtes are forfeitures * *ipſo facto.*

Permiſſive: As if he ſuffereth his houſe to decay or fall to ground for want of neceſſary

* *Immediately.*

repara-

reparations; or if he ſuffereth his meadow for want of mending his banks to be ſurrounded, ſo that it becomes ruſhy, or worth nothing; or his arable ground ſo to be ſurrounded, that it is become unprofitable; theſe and the like permiſſive waſtes are forfeitures *ipſo facto*.

And thus much of acts which are forfeitures *eo inſtante* that they are committed. A word of thoſe acts which are ſaid not forfeitures till preſentment.

SECT. LVIII.

AND ſuch are thoſe offences which by common preſumption the lord cannot of himſelf have notice of, without notice given: as if a copyholder committeth felony or treaſon.

So if a copyholder be outlawed or excommunicate; that the lord may have the profits of his copyhold land, a preſentment is neceſſary.

So if a copyholder goeth about in any other court to intitle any other lord unto his copyhold, or if he alieneth by deed; theſe and the like ought to be preſented.

If a copyholder maketh a bargain and ſale of his copyhold, and it is not inrolled according to the ſtatute; this is no forfeiture, no more than a feoffment without livery; becauſe nothing paſſeth.

So if a copyholder maketh a feoffment of all his lands in *Dale*, and maketh livery in his charter-lands; no part of his copyhold land is thereby forfeited: but if livery be made in any part of the copyhold lands, all his copyhold lands are forfeited.

If a copyholder, by deed of bargain and ſale inrolled according to the ſtatute, doth bargain and ſell all his lands in *Dale*, having both copyhold, and freehold, his copyhold is not thereby forfeited; for the law will conſtrue this to extend to his freehold only, rather than by any over-large conſtruction make a forfeiture in this kind.

And if a copyholder by deed inrolled, bargaineth or ſelleth all his copyhold lands in *Dale*, or all his lands in *Dale* generally, having no freehold lands; this is a forfeiture.

Thus I have ſhewed you what acts amount to a forfeiture. Now I will ſhew you what perſons are able to forfeit.

SECT. LIX.

A MAN * *non ſanæ memoriæ*, an idiot, or a lunatick, though they be able to take a copyhold, yet they are unable to forfeit a copyhold, becauſe they want common reaſon, nay common ſenſe.

So an infant that is under the age of fourteen is unable to forfeit his copyhold, becauſe he wanteth diſcretion; and till then he is to be in ward to the next of his kindred to whom the inheritance cannot deſcend, or to the lord or the bailiff of the manor, as the cuſtom ſhall warrant.

So a feme-covert, by any act ſhe can do of herſelf, cannot poſſibly forfeit her copyhold, becauſe ſhe is not † *ſui juris, ſed ſub poteſtate*

* *Of not ſane memory.*

† *At her own will, but under the power of her huſband.*

viri: but if ſhe do any act which amounteth to a forfeiture by the conſent of her huſband, this is in her a forfeiture.

An infant at the age of diſcretion may forfeit his copyhold, not by offences which proceed from negligence or ignorance, but by ſuch as proceed from contempt.

If an infant come not in to be admitted, according to the cuſtom, at three ſolemn proclamations made at three ſeveral courts, or if he will ſuffer his houſes to go to ruin, or his ground to be ſurrounded; theſe acts, ſavouring of negligence only, are no forfeitures.

So if an infant copyholder ſueth a replevin againſt the lord upon a diſtreſs lawfully taken, or if he alieneth by deed, or the like; theſe acts, reliſhing of ignorance only, are no forfeitures.

But if he denieth from time to time to pay the lord the rent, or committeth voluntary waſte, notwithſtanding often warning given him by the lord; theſe acts proceeding from malice and contempt, are forfeitures: and ſo if he committeth felony or treaſon.

If a guardian of a copyholder committeth waſte, he ſhall forfeit the wardſhip only, not the inheritance of the copyhold.

If * *Cuſtuy que uſe* of a copyhold committeth waſte, he ſhall not forfeit the copyhold.

If the huſband committeth waſte in copyhold lands which he hath in the right of his wife; this is a forfeiture of the wife's copyhold. Co. 4. *fol.* 27. *a.*

But if a ſtranger committeth waſte without the conſent of the huſband; this is no forfeiture, though the wife conſenteth.

* *If he to whoſe uſe.*

If

If a diſſeiſor of a copyhold committeth waſte, this is no forfeiture.

So if a copyhold be ſurrendered to the uſe of *J. S.* and before admittance *J. S.* committeth waſte; this is no forfeiture, for by the ſame reaſon that he cannot grant before admittance, he cannot forfeit before admittance.

If two joint-tenants be of a copyhold, and one committeth waſte, he forfeiteth his part only; for no man can forfeit more than he hath granted.

And therefore if there be tenant for life with a remainder over of a copyhold, and the copyholder for life purchaſeth the manor, committeth waſte, or doth any act which amounteth to the extinguiſhment of the forfeiture of a copyhold, yet the remainder is not hereby touched.

And ſo if a copyhold be granted to three * *habend. ſucceſſive*, where by the cuſtom of the manor this word *ſucceſſive* taketh place; the firſt copyholder cannot prejudice the other two by any act he can do, no more than if a copyholder in fee by licence maketh a leaſe for years by deed, or without licence by copy, and either of theſe leſſees committeth waſte, the reverſion is not hereby forfeited.

If I have two ſeveral copyholds by two ſeveral copies, and I commit waſte in one; this is a forfeiture of this one only, and not of the other.

And ſo if I grant theſe ſeveral copyholds by one copy, yet they continue ſeveral as they did before; and the forfeiture of the one is not the forfeiture of the other.

* *To have ſucceſſively.*

The

The ſame law is, if two ſeveral copyholds eſcheat to the lord, and he regranteth them again by one copy.

And thus have I ſhewed what perſons are able to forfeit. I will now in a word ſhew what perſons are able to take benefit of a forfeiture.

SECT. LX.

REGULARLY it is true, that none can take benefit of a forfeiture, but he that is lord of the manor at the time of the forfeiture.

And therefore if a copyholder maketh a feoffment, and then the lord alieneth, neither the grantor nor the grantee can take benefit of this forfeiture; for neither a right of entry nor a right of action can ever be transferred from one to another. And therefore if a freeholder alieneth in mortmain, and then the lord granteth away his ſeigniory, neither the one nor the other can ever take benefit of this forfeiture.

So if a leſſee for life committeth waſte, and then the leſſor granteth away the reverſion; this waſte is made diſpuniſhable.

But if tenant for life be of a manor, with remainder over in fee to a ſtranger, if a copyholder committeth waſte, and then tenant for life of the manor dieth before entry; yet he in remainder may enter, for he had an intereſt in the manor at the time of the forfeiture committed, though he could not enter by reaſon of the State in tenant for life, which being determined, his entry is now accrued unto him for the forfeiture committed in the life of tenant for life.

And

And ſometimes he that is neither lord of the manor at the time of the forfeiture committed, nor ever after, ſhall take benefit of a forfeiture.

As if the lord of a manor granteth a copyhold in fee, and then granteth the frank-tenement or the inheritance of this copyhold to a ſtranger; the grantee, though no lord of the manor, nor able to keep any court, ſhall take benefit of forfeitures made by the copyholder; as if the copyholder do make a feoffment, leaſe, waſte, deny the rent, &c.

Co. 4. *fol.* 28.

Thus have I ſhewed what perſons are able to take benefit of a forfeiture. I will now in one word ſhew what acts amount to a confirmation of an eſtate forfeited.

SECT. LXI.

IF the lord doth any thing whereby he doth acknowledge him his tenant after forfeiture; this acknowledgment amounteth to a confirmation: as if he diſtraineth upon the ground for rent due after forfeiture, or if he admitteth after the forfeiture, or the like, theſe are eſtoppels to the lord, ſo that he can never enter, ſo the lord have notice of ſuch forfeitures before any ſuch act which may amount to a confirmation be done. Yet ſome make this difference, that theſe forfeitures only which deſtroy not the copyhold are confirmable by ſubſequent acknowledgment, and not thoſe forfeitures which tend to the deſtruction of a copyhold: as if the copyholder maketh a feoffment, by this the copyhold is deſtroyed, and

and therefore no ſubſequent acknowledgment of the lord will ever ſalve this ſore.

And this ſhall ſuffice for forfeitures. I come now, in the laſt place, to ſhew what acts amount to the extinguiſhment of a copyhold.

SECT. LXII.

WHERESOEVER a copyhold is become not demiſable by copy, either by the act of the lord, by the act of the law, or by the act of the copyholder himſelf, it is extinguiſhed for ever.

By the act of *the lord:* As if a copyholder eſcheateth, and the lord granteth away any eſtate by deed, this is an extinguiſhment. So if he maketh a feoffment upon condition, and then entereth for breach of the condition; yet the copyhold is extinguiſhed, becauſe once not demiſable. Co. 4. *fol.* 31,

But if the lord keepeth the copyhold lands for never ſo many years, or granteth at will; this deſtroys not the copyhold, becauſe it continueth ever demiſable by copy.

By the act of *the law:* As if the copyhold eſcheated be extended upon a ſtatute or recognizance acknowledged by the lord, or if the feme of the lord hath this land aſſigned unto her for her dower; although theſe impediments be by the act of the law, yet becauſe they are lawful, the land can never after be granted by copy.

By the act of *the copyholder himſelf:* As if he accepteth a leaſe for years at the Common law, either mediate, or immediate from the lord of the

the copyhold; this is an abſolute extinguiſhment.

But if he accepteth a leaſe for years of the manor, the copyholder by this hath not continuance, but this is no extinguiſhment, becauſe the land continueth ſtill grantable by copy.

If a copyholder with licence make a leaſe for years to a ſtranger, or without licence maketh a leaſe for years to the lord; the copyhold is not hereby extinguiſhed, and yet it is not demiſable by copy.

So if a copyholder intermarrieth with a feme ſeignoreſs; this is a ſuſpenſion only of the copyhold, no extinguiſhment.

So if the interruption be tortious, as the lord be diſſeiſed, and this diſſeiſor dieth ſeiſed; or if the land be recovered by falſe verdict, or erroneous judgment, and after the land is recontinued; it is not extinguiſhed, but may be granted again by copy: for * *non valet impedimentum quod de jure non ſortitur effectum; et quod contra legem fit pro infecto habetur.*

And ſo I conclude with copyholders, wiſhing that there may ever be a perfect union betwixt them and their lords, that they may have a feeling of each others wrongs and injuries; that their ſo little commonwealth, having all its members knit together in compleat order, may flouriſh to the end.

* *An impediment, which has no effect by law avails nothing; and what is done contrary to law, is looked upon as undone.*

SUP-

This supplement is not by Cotton 3 JR 171

SUPPLEMENT
TO THE
Compleat Copyholder.

SECTION I.

What a ſurrender of copyhold or cuſtomary eſtate is; to whom, and in what manner and place it is to be done; and who ſhall be ſaid ſuch a tenant of a copyhold as may make ſuch a ſurrender.

SURRENDERS of copyhold lands and copyholders are of two ſorts; *viz.* Surrenders actual, and Surrenders in law.

An actual ſurrender, according to the definition of Mr. *Littleton*, and the beſt deſcription of it, is a copyholder's yielding up of his copyhold lands or cuſtomary eſtate into the hands of the lord of the manor, in the court of the manor, or unto his bailiff, reeve, or ſteward, to ſuch uſes and for ſuch eſtates as are particularly mentioned in the ſurrender itſelf, made by a deed or writing; or if it be by word, in the preſence of the lord and tenants in the court of the manor. And yet it hath been a great doubt and queſtion, whether of copyholds or cuſtomary eſtates, any words uſed to

to the lord himſelf ſhall amount to make it a good ſurrender.

Proofs.

Litt. 15. *b.* Book of Entries 131. acc. *Vide* Mr. Littleton, in his chapter of tenant by copy, &c. *fol.* 15. * *Ad hanc curiam venit* A. B. *& ſurſumreddidit in eadem curia in manus domini, &c. unum meſſuagium, &c. ad uſum* C. D. *et hæredum ſuorum, &c.*

H. 7 *Jac. B. R. Simpſon* and *Sothern's* Caſe. *H.* 17 *Jac. in B. R. Bambridge* and *Whitton's* Caſe acc. But if the ſurrender be made in court into the hands of the lord or his ſteward, it muſt be to ſuch a perſon or his uſe who is *in eſſe* and capable of ſuch a ſurrender, or that may take preſently by force of the ſurrender; otherwiſe ſuch ſurrender, though it be an actual ſurrender made in the court of the manor to the lord or ſteward himſelf, is not good.

A copyholder in fee ſurrendered his copyhold lands into the hands of the lord of the manor, *Habendum* after his deceaſe to the uſe of an infant † *in ventre ſa mier*, and if the ſaid infant died within age, then to the uſe of *J. S.* and his heirs. In this caſe theſe points were reſolved. 1. If a copyholder in fee doth ſurrender his copyhold lands into the hands of the lord, to the uſe of himſelf and his heirs, That in that caſe, becauſe the limitation of the uſe to him who had it before was void, the ſurrender thereof to the lord himſelf was alſo void. 2. That the ſurrender made to the infant † *in ventre ſa mier* was not good as an immediate ſurrender, and to take effect immediately, as the intention of the ſurrenderer was it ſhould,

* A. B. *came to this court, and ſurrendered in the ſame court into the hands of the lord,* &c. *one meſſuage* &c. *to the uſe of* C. D. *and his heirs,* &c.

† *In his mother's womb.*

becauſe

becauſe it was of a freehold, which could not begin at a day to come.

But yet *quære*, If the ſurrender be made into the hands of the lord, to the uſe of the right heirs of the ſurrenderor, if the lands ſhall not continue in the hands of the lord till the death of the copyholder who made the ſurrender, for the court doubted of it, *Paſc.* 30 *Eliz.* in *Allen* and *Palmer*'s Caſe. *Vid. Eliz. Allen* and *Palmer's* Caſe, *Leon.* part 1. 101.

A ſurrender being then by the copyholder himſelf, in the court of the manor, to the lord, of his copyhold or cuſtomary lands; if then, upon the very act done, the eſtate be in the lord, or in the ſurrenderor, or in whom it reſteth, remaineth a doubt. For reſolution thereof, I humbly conceive the law to be, and ſo it hath been reſolved, that notwithſtanding ſuch a ſurrender made, yet the eſtate remaineth in the copyholder who ſurrendereth, and is not in the lord, or in any other perſon whatſoever. But in caſe where the copyholder doth ſurrender his copyhold in the court of the manor to the uſe of the lord himſelf, (which he may do) there, by ſuch a ſurrender, the land is immediately veſted in the lord without any other act done or required, becauſe the lord cannot take a ſurrender, as to make thereof an admittance unto himſelf.

And to that purpoſe * *vide Eriſh* and *Rive's* caſe, where it was reſolved, That if a ſurrender be made by a copyholder of his copyhold lands into the hands of the ſteward of the manor to the uſe of the ſteward himſelf, that ſurrender is good without any farther act, for the reaſon aforeſaid. * *Cro. Eliz.* 717.

Having thus ſhewed what will be a good ſurrender of copyhold or cuſtomary lands by an actual ſurrender in the court of the lord of the manor, I ſhall now conſider,

SECT. II.

Whether a copyhold may be ſaid to be ſurrendered by any act, words, or agreement, made betwixt the lord and the copyholder, or by the copyholder with a ſtranger made in the court, in the preſence of the lord or his ſteward.

Vid. Leon. 1 part, 372. *Penruddock* and *Newman's* Caſe.

I DO conceive generally, that no act or words of the copyholder can paſs his copyhold in ſuch a manner, as that the ſame ſhall be accompted to amount to a good ſurrender of the ſame. But yet it reſts upon a difference.

Proofs.

If a copyholder bargain and ſells his copyhold by deed of bargain and ſale enrolled, though it be to the lord of the manor himſelf, it is void, and ſhall not amount to a ſurrender.

If tenant for life of lands at the Common law agrees with his leſſor, or him in the reverſion, that he ſhall have his intereſt in the land for the rent of 20 *s. per annum*; this agreement will not amount to a ſurrender of his land by the Common law. *A fortiori*, If a copyholder, or other cuſtomary tenant, ſhall ſay to his lord, or other perſon in the court of the manor, I agree to ſurrender my lands; theſe words will not be a preſent or an expreſs ſurrender, nor will they amount to ſo much as a relinquiſhing of his eſtate: for in truth it is not

not any thing in preſent, but an act to be done *in futuro:* Like unto the caſe put by *Wray* chief juſtice; *A.* ſeiſed of the manor of *D.* demiſeth the ſame manor at will; that it is no leaſe. No more in the other caſe ſhall it be a ſurrender, or a relinquiſhing of his copyhold or copyhold eſtate. But yet notwithſtanding it will be agreed, that in ſome caſes an expreſs and particular agreement made by a copyholder with the lord of the manor for or concerning his copyhold lands will amount to a ſurrender of the ſame. *Tr.* 31 *Eliz. in B. R. Sweeper* and *Randal's* Caſe, *Leon.* 1 part, 177, 178.

The caſe was, That the lord of a manor, pretending that a copyholder had forfeited his copyhold lands, entered into a communication with the copyholder concerning the ſame: Upon the communication thereof had betwixt them, it was agreed, that the copyholder ſhould pay unto the lord the ſum of 10 *l.* which he paid accordingly; and that in conſideration thereof, the copyholder ſhould have election, whether he would have the land aſſured unto him by copy or by bill, for the life of him and his wife, or * *durante viduitate* of the wife: who made his election to have the land by bill. It was the opinion of the juſtices in that caſe, That this agreement was a good ſurrender of the lands, and a good eſtate thereupon veſted in the wife for her life. *M.* 32 *Eliz. in Co. B. Collum* and Sir *Hugh Portman's* Caſe, *Leon.* 1 part, 191.

A copyholder in fee came into the court of the lord of the manor, and took a new eſtate of his copyhold lands from the lord to himſelf for life, and afterwards to his wife for life, and after to his ſon for life. It was a queſtion, *M.* 13 *Jac. B. R. Burfield* and *Adams's* Caſe.

* *During the widowhood.*

whether this act of the copyholder was the giving up and the relinquishing of his estate of inheritance in his copyhold, and did amount to a surrender of his old estate therein. It was agreed in this case, That if a copyholder of inheritance takes a lease by indenture for years of the lord of his copyhold, that by that act of his, his inheritance in his copyhold is gone and determined. But it seemed to be the better opinion of the court, That altho' that this taking of a new estate shall imply a surrender, and be accounted as to some purpose to amount to a surrender; yet in the judgment of law it shall be but as a surrender to his use for life, and after to his wife and son for their several lives, and that still the inheritance of the copyhold remains in him. But *quære* this case. For that *H.* 36 *Eliz. in Co. B. Rot.* 2640. in *Adams* and *Shepheard*'s case, it seemeth to be adjudged to the contrary.

Vid. 29 *Eliz.* Co. 2 part, *Lane*'s Case. p. 16. *b.*

A copyholder said to his lord, that he would not hold his land longer by copy, but by a bill under the lord's hand for his life, who made him such a bill, which the copyholder accepted of. It was agreed by the justices in that case, That thereby his copyhold was determined.

Vid. Colman and *Bedil*'s Case, *Anderson*'s Reports 199. acc.

SECT. III.

Of surrenders out of court; and where surrenders to the steward, deputy-steward, or into the hands of tenants of the manor, out of court, shall be good, where not.

BY the general custom of the realm a copyholder may surrender his lands in the court of the lord of the manor, or out of court

court, to the lord, by the hands of tenants of the manor: But a ſurrender out of court to the lord, or by the hands of tenants of the manor, or of the bailiff or reeve, is not good without a ſpecial cuſtom.

The lord hath ſuch an abſolute intereſt in his manor, that he may hold a court within his manor at what time he pleaſeth: But he is not compellable by his copyholder to hold or call a court to accept of a ſurrender. But if he doth accept of ſuch a ſurrender of his copyholder out of court, the ſame is good, whether it be to his own uſe, or to the uſe of other perſons. And as the lord may himſelf accept of a ſurrender out of court, ſo likewiſe may the lord himſelf grant new copies of the lands out of court, and ſuch grants ſhall be good. But the lord himſelf cannot hold his own court for any of the purpoſes aforeſaid. But the lord himſelf may give authority unto others to take ſurrenders to the uſe of others out of court; and ſo may his ſteward or under-ſteward give conditions to others to take the like ſurrenders out of court to other uſes, which conditions ſhall be in the nature of a *Dedimus poteſtatem.* And ſo it was reſolved in a caſe out of *Ireland*, referred to the judges of *England*, to certify their opinions therein; where the caſe was, The ſteward of the court of a manor in *Ireland*, being in *England*, ſent a writ in the nature of a *Dedimus poteſtatem* to one who was in *Ireland*, to take a ſurrender there of copyhold lands: and the opinion of the judges here, to whom the caſe was referred to adviſe and certify their opinions, was, That ſuch a ſurrender taken by *Dedimus* was good

M. 14 *Jac. B. R. Froſwell* and *Welſhe's* Caſe, *Bridgman* 52.

A copyholder in fee did ſurrender into the hands of two tenants, according to the cuſtom, to the uſe of *A.* and *B.* who thereupon entered into and upon the lands, and paid the rent to the lord; but before any court was kept for the manor, the tenants to whom the ſurrender was made, as alſo the copyholder the ſurrenderor, all of them died, and thereupon the heir of the copyholder ſurrenderor entered upon the ſaid *A.* and *B.* and made a leaſe for years of the lands, which leaſe was warranted by the cuſtom. In that caſe it was reſolved, That the leaſe for years was well made, becauſe that before ſuch time that the preſentment was made in court of the ſurrender, the intereſt of the copyholder did remain in the ſurrenderor, and his right deſcended unto and upon his heir, and he might take and receive the rents and profits of the lands; for that no perſon can have a copyhold, or a copyhold eſtate, but ſuch a perſon who comes into the ſame by the cuſtom of the manor, *viz.* by admittance of the lord, which in this caſe *A.* and *B.* did not do. But in that caſe it was doubted by the juſtices, but not reſolved, Whether the acceptance of the rent by the lord at the hands of the ſaid *A.* and *B.* did amount to an admittance or not.

M. 9 *Jac. Cro.* 2 part, *Porter* and *Porter's* Caſe.

There were two joint-tenants in fee of lands which were holden by copy. One of them, according to the cuſtom, ſurrendered into the hands of two tenants to the uſe of his laſt will, and afterwards he made his will, and thereby deviſed the lands. In that caſe it was holden by the juſtices, That becauſe the ſaid ſurrender was preſented by the tenants in the court of

of the lord, that the ſaid ſurrender ſhould bind the ſurvivor; for that it ſhall have a relation to the firſt time of the ſurrender. But if in that caſe the copyholder who made the ſurrender had died before the ſame had been preſented; then the copyhold had ſurvived to the ſurviving joint-tenant.

Two coparcenors, copyholders, were in poſſeſſion; the one did ſurrender her reverſion in the moiety after her deceaſe. It was adjudged a void ſurrender, becauſe a freehold could not commence *in futuro*, as well of copyhold lands as of freehold lands. *P.* 10 *Jac. B. R. Godb.* 141.

A copyholder ſurrendered a meſſuage and 20 acres of lands into the hands of two tenants out of court, to the uſe of *J. S.* and his heirs, upon condition, that if he paid *J. S.* 100 *l.* before ſuch a day, the ſurrender to be void. Before the day of payment he ſurrendered one acre, parcel of the 20 acres, unto *J. D.* and his heirs, and afterwards he performed the condition by paying the 100 *l.* and afterwards in court he ſurrendered the ſaid meſſuage and 20 acres of lands into the hands of the ſteward, to the uſe of *J. N.* and his heirs. It was found by the jurors that the firſt ſurrender made to *J. S.* was never preſented, but the two laſt ſurrenders were preſented. In this caſe it was reſolved, That by the conditional ſurrender nothing paſſed, until it was preſented; but the intereſt, right and poſſeſſion remained in the copyholder who made the ſurrender, ſo as he might transfer it to whom he thought good. For although it was a ſurrender unto the hands of tenants, and ſo according to the manner of the ſurrender the ſame was good by the cuſtom; *M.* 8 *Jac. in B. R. Cro. Car.* 273, 283 *Burgoyne* and *Spurling*'s Caſe.

yet becauſe the ſaid ſurrender into the hands of tenants was but an inchoation of the caſe to whoſe uſe the ſurrender was made, which had no farther perfection or proſecution, but became void by the performance of the condition, the firſt of the two laſt ſurrenders preſented, *viz.* the ſurrender to the uſe of *J. D.* and his heirs, ſtood good, and the laſt ſurrenrender to the uſe of *J. N.* and his heirs took no effect.

Coke 9 part, *Comb's* Caſe. P. 75.

A copyholder in fee made a letter of attorney to two tenants of the manor, to ſurrender his copyhold out of court to the uſe of *J. S.* and his heirs: They ſurrendered the ſame accordingly, and at the next court brought in the ſurrender into court, (but no cuſtom was found to warrant ſuch a ſurrender.) Notwithſtanding in that caſe it was reſolved, 1. That it was a good ſurrender, becauſe he might do it * *de communi jure* without alledging any cuſtom. 2. When the tenants ſhewed the ſame in court, and the authority which was given to make the ſurrender, all which they had done was reſolved to be good, and legally done.

SECT. IV.

Where, although ſurrenders are made to the lord or to tenants out of court by cuſtom, yet nothing paſſeth out of the copyholder before admittance: And what ſhall be a good admittance in ſuch caſe, what not.

ADMITTANCE is the life and perfection of the copyholder's eſtate, and before admittance the tenant is not a perfect copyholder.

* *Of common right.*

Proofs.

Proofs.

The cuſtom of a manor was, That a copyholder might ſurrender his copyhold out of court to the uſe of another; the party to whoſe uſe it was, to be admitted at the next court. Such a ſurrender was made, but before the next court * *ceſtuy que uſe* died, and ſo was not admitted. It was reſolved in this caſe, That he was not a copyholder within the cuſtom; for by the ſurrender before admittance the ſurrenderee hath no poſſeſſion, and the heir is in by diſcent, and holds by the copy of his anceſtor, and ſo the * *ceſtuy que uſe* is not a perfect nor compleat copyholder. And it may be compared to the caſe where a man makes a feoffment in fee of lands, and makes livery within the view; it is no perfect livery till he doth enter into the lands, but the feoffor may puniſh a treſpaſs there done in the interim, for it is but *inchoatum* until he enter. And ſo it is in caſe of a copyholder; the ſurrender is but † *quaſi inchoatum*, as before, till he be admitted to the copyhold. *Vid. Froſwel*'s caſe before. *M.* 23 *Car. B.R. Baker* and *Denham*'s Caſe.

In 26 *Eliz.* the queſtion was, Whether the copyholder might have an action upon the caſe againſt the lord for not holding his court, and not admitting of him to whom a ſurrender was made according to the cuſtom of the manor. It was reſolved in that caſe, That the copyholder himſelf might have the action. But in that caſe it was reſolved, That he to whom the ſurrender was made, until admittance, by force of the ſurrender had nothing: it was only an act begun, and not perfected; and therefore 26 *Eliz. Galloway*'s Caſe vouched in *Bulſtr.* 3 part, 217.

* *He for whoſe uſe.* † *As begun.*

in

in ſuch caſe he could not maintain the action of the lord for not admitting of him.

A ſurrender of a copyhold is like to the induction into a benefice: before induction there is no poſſeſſion; ſo before admittance there is no poſſeſſion.

M. 12 *Jac.* *Robinſon* and *Green*'s Caſe, *Bridgman* 82, 83. *Bulſtr.* 3 part, 238. acc.

A copyholder, according to the cuſtom, did ſurrender out of court into the hands of tenants to the uſe of *J. S.* and his heirs; which ſurrender was delivered into the court by the ſaid tenants and there preſented; which was accepted of by the ſteward of the manor, and an entry made thereof in the court-roll, and a copy of the ſurrender was delivered unto *J. S.* and in the copy it was, *viz.* * *Compertum eſt per homagium*, that the ſurrender was to *J. S.* and his heirs. It was the opinion of the court in this caſe, That none of theſe colourable things did imply a perfect admittance to the copyhold. For 1. The acceptance of the preſentment by the ſteward from the homage was no more than what he was bounden to do as being judge of the court. 2. The entry of it in the roll was but an office of duty, being but an evidence for the lord, as alſo for him to whoſe uſe the ſurrender was; and ſo was the delivery of the copy to *J. S.* the *ceſtuy que uſe*. But none of theſe things did imply the conſent or will of the lord, that the *ceſtuy que uſe* ſhould be admitted or have the lands according to the ſurrender; and all theſe things together do not imply any admittance, for all of them may be done, though no admittance be in the caſe.

* *It is found by the homage.*

Note;

Note; It was reſolved in the court of *King's Bench*, That if a ſurrender be of a copyhold to *J. S.* it is of no effect until he be admitted tenant: and if before admittance *J. S.* doth ſurrender the land unto another, a ſtranger, who is admitted, yet nothing paſſeth to the ſtranger by this admittance of the ſtranger. *M. 6 Jac. in B. R. Wilſon and Weddall's Caſe, Yelv. 144.*

SECT. V.

Where ſome things, and what things, may be done by the copyholder or his heir before admittance.

Proofs.

1. THE heir of a copyholder may enter and have an action of treſpaſs before admittance. 2. A * *poſſeſſio fratris* or *ſororis* may be of a copyhold before admittance. 3. A diſcent ſhall not bind the heir of a copyholder. 4. He may ſurrender unto a ſtranger before admittance. *Co. 4 part, Clark and Penyfather's Caſe, p. 23.*

A copyholder in fee had iſſue two daughters by divers women, and died ſeiſed; the daughters entered, and took the profits many years; and before admittance, the eldeſt daughter died without iſſue, and afterwards the youngeſt daughter was admitted to the whole land, as ſole heir to the father. In this caſe it was holden, That the poſſeſſion of the eldeſt daughter, though before admittance, ſhould make her ſiſter, though of the half blood, inheritable to the land. *Vid. 12 Eliz. Dyer 291.*

If a copyholder in fee by licence maketh a leaſe for years, and the leſſee entereth, the copyholder having a ſon and a daughter by one woman, *24 Eliz. in Co. B. Coke 4 23. Brown's Caſe acc.*

* *Poſſeſſion of brother or ſiſter.*

woman, and a ſon by another; the land ſhall deſcend to the daughter of the whole blood, although that the ſon died, and was not admitted to the copyhold as heir to his father. And that that ſhould be *poſſeſſio fratris* of a copyhold before admittance.

40 *Eliz. in B. R. Arnold* and *George's* Caſe, *Yelv.* 16. acc.

If a copyholder doth ſurrender to a ſtranger, and the ſteward will not admit him, and the ſtranger enters, and holds the land; if the lord bring treſpaſs againſt him before admittance, he may plead not guilty, and his plea ſhall be good, and it ſhall be found againſt the lord, becauſe he is *particeps criminis* to the admittance, becauſe it ſhall be intended, that the lord would not ſuffer the ſteward to admit him to the copyhold.

Tr. 2 *Jac. B. R. Joyner* and *Lambert's* Caſe, *Cro.* 2 36.

A copyhold was ſeized by the lord of the manor, and he granted it to another in fee, who died, and his heir was admitted; then the firſt copyholder died, and his heir entered, and ſurrendered unto a ſtranger in fee. It was reſolved in that caſe, That the entry of the heir was lawful, though he was not admitted to the copyhold eſtate, and the deſcent of the land to the heir of the grantee of the lord ſhould not bind him. And farther it was reſolved in that caſe, That the heir of the copyholder being in the land, his ſurrender of the land unto a ſtranger was good before his admittance.

SECT.

SECT. VI.

Where the lord is but an inſtrument to convey the copyhold by admittance only, and that the ſurrenderee is in by the copyholder, and not by the lord.

ALTHOUGH generally (as before is ſaid) a copyholder cannot enter and have ſeiſin of the land without the admittance of the lord, no more than a parſon or prebend can have ſeiſin, or be full incumbent, till the archdeacon hath inducted him, or the dean and chapter inſtalled him: yet the lord is but an inſtrument uſed for the ſettling of the copyholder in his copyhold, and to transfer the land * *ſecundùm formam et effectum ſurſumredditionis*, and the eſtate, right and intereſt in the copyhold doth not paſs as from the lord; but upon the admittance made by the lord the copyholder is in by him who made the ſurrender, and by the cuſtom, and ſeiſed of the copyhold † *ſecundum conſuetudinem manerii, &c.* *Vide Plowd. Com.* 241. in *Hare* and *Bickley's* Caſe.

Proofs.

The lord of a manor demiſed copyhold of inheritance to *A.* upon condition that he ſhould pay to *B.* 20*s.* yearly during his minority, and 100*l.* at his full age. *A.* paid not the 20*s.* but ſurrendered the land to the uſe of *P.* and his heirs. The lord admits him. *B.* attains his full age, and the 100*l.* is not paid. The lord enters for the condition broken, and grants the *M.* 40 *Eliz. B. R. Pay* and *Brown's* Caſe, *Cro. Eliz.* p. 582.

* *According to the form and effect of the ſurrender.*
† *According to the cuſtom of the manor.*

land

land by copy to *B.* *P.* enters upon him. It was holden in this caſe, That his entry was lawful, for that he to whoſe uſe the ſurrender was made comes in by him who ſurrendered, and not by the lord.

Tr. 15 *Jac. B. R. Brook's* Caſe, *Poph.* 125. A copyholder in fee ſurrendered his lands into the hands of the lord by the hands of the tenants, according to the cuſtom, without expreſſing to whoſe uſe it ſhould be. At the next court he was admitted, *habendum* to him and his wife in tail. It was objected, That no uſe being expreſſed, the ſurrender was void, and the admittance not good, to paſs an eſtate to the wife not being named in the premiſſes; but in the *habendum* only. It was reſolved, 1. The ſurrender was good, for it ſhall be intended, that the ſurrender generally made was to ſuch uſe as was ſpecified in the admittance, and the lord was only as an inſtrument put in truſt to convey the eſtate, and make ſuch admittance as he who ſurrendered would have him to make. 2. That the wife ſhould take by the admittance, though ſhe was not named in the premiſſes, but in the *habendum* only.

33 *Eliz. Co.* 4 part, p. 28. *Weſtwick's* Caſe. If a copyholder ſurrendereth his lands to the uſe of *J. S.* the lord hath but a cuſtomary power to make the admittance * *ſecundùm effectum et formam ſurſumredditionis.* And if in ſuch caſe the lord grants the land to *J. S.* and a ſtranger, all ſhall enure to *J. S.* and nothing to the ſtranger. And if the copyholder doth ſurrender his lands without a condition, if the lord doth admit the tenant upon a condition, the condition is void; for that after the

* *According to the effect and form of the ſurrender.*

admit-

admittance the ſurrenderee is in by him who made the ſurrender, and not by the lord.

A copyholder ſurrenders to the uſe of another; the lord admits him to hold to him and his heirs: yet he ſhall have but an eſtate for life, for that after the admittance he is in by him who made the ſurrender, and not by the lord. 28 *Eliz. Co.* 4 part, *Bunting's* Caſe, p. 29.

The cuſtom of the manor was, That a copyholder for life might take timber to repair: The king made a leaſe of the manor, excepting woods and underwoods and trees: The leſſee for years of the manor grants a copyhold upon which were timber-trees to another for life, who cuts timber to repair. It was reſolved, That in this caſe, notwithſtanding the ſeverance and exception, the grantee ſhould have the trees, for that the eſtate of the copyholder who comes in by a voluntary grant is in by the cuſtom, and the lord is but an inſtrument to make the grant. *Coke* 8 part, in *Swayne's* Caſe, p. 63.

When a copyholder ſurrenders to the uſe of another, and the lord admits him; now he who is admitted is in by him who makes the ſurrender. For in a plaint in the nature of a writ of entry in the *per*, he ſhall be ſuppoſed to be in the *per* by him who made the ſurrender, becauſe the lord is but an inſtrument to make the admittance; and he who is admitted ſhall not be ſubject to any charges or incumbrances of the lord, for the lord hath but a cuſtomary power to make the admittance * *ſecundùm effectum ſurſumredditionis*, as before is ſaid. *Co.* 4 part, in *Taverner's* Caſe, p. 27.

* *According to the effect of the ſurrender.*

M. 37 *Eliz. Cro. Eliz. Berry* and *Green's* Caſe, p. 349.

A copyholder ſurrenders to the uſe of *J. S*, the lord refuſeth to admit him: he cannot enter, unleſs there be an eſpecial cuſtom to warrant it; but if there be, then he may enter.

SECT. VII.

Where the admittance of the particular tenant ſhall be the admittance of him in the remainder.

Proofs.

M. 24 *Eliz. Co.* 4 part, *Brown's* Caſe, p. 21.

A COPYHOLDER in fee by licence made a leaſe for years; the leſſee enters; the copyholder, having iſſue a ſon and a daughter by one woman, and a ſon by another, died; the eldeſt ſon died before admittance. In this caſe it was reſolved, (amongſt other things) That the admittance of tenant for life is the admittance of him in the remainder, but not to bar the lord of his fine, which he ought to have by the cuſtom.

P. 36 *Eliz. B. R. Coke* 4 part, *Fitch* and *Huckley's* Caſe, p. 23.

The father a copyholder in fee made a ſurrender to the uſe of himſelf for life, and after to the uſe of his ſon for life, and after to the uſe of his laſt will. The father was admitted, and died: The lord pretending a forfeiture entered, and granted the copyhold to a ſtranger. Reſolved, That the admittance of the tenant for life was the admittance of him in the remainder; and then the land could not veſt in the grantee of the lord.

Tr. 35 *Eliz. B. R. Dill* and *Higden's* Caſe, *Moore* 358.

It was reſolved by the juſtices, That the admittance of tenant for life of a copyhold is the admittance of him in the remainder, becauſe he is to pay his fine which is intire, and no fine is due to be paid by him in the remainder

der to the lord: but otherwiſe it is of him in the reverſion.

A copyholder ſurrendered to the uſe of one for life, the remainder to another in fee: Tenant for life was admitted: He in the remainder ſurrendered to the uſe of *J. S*, which ſurrender the lord accepted of, and admitted him, and then the tenant for life died. It was holden in this caſe, That the heir of *J. S.* ſhould have the land, for that the admittance of the tenant for life was the admittance of him in the remainder; and alſo becauſe the acceptance of the lord was *quaſi* an admittance to him in the remainder. *M.* 39 *Eliz. B. R.*

A copyholder in fee ſurrendered to the uſe of his wife for life, the remainder to his younger ſon in fee, and died: The wife was admitted, but the younger ſon refuſed to be admitted during the life of his mother, but afterwards, without other admittance, he ſurrendered to the uſe of *J. S.* It was reſolved, That the admittance of the mother tenant for life was the admittance of the younger ſon in the remainder, becauſe they made but one eſtate. *Tr.* 2 *Jac. B. R. Auncelme* and *Auncelme's* Caſe, *Cro.* 2 part, p 31.

A copyholder had iſſue 3 ſons, *B. C.* and *D.* and ſurrendered to the uſe of his laſt will, and thereby deviſed the ſame to his wife for life, the remainder to *C.* and the heirs of his body: The wife died after admittance, and the lord granteth the copyhold to *D* in fee, who ſurrendered to the uſe of *J. S.* for life, and after died without iſſue: *B.* the eldeſt ſon entered. It was adjudged, That his entry was lawful, and that admittance of him was not neceſſary; for that if a copyholder ſurrendereth to the uſe *Hil.* 31 *Eliz. B. R. Bullein* and *Graunt's* Caſe, *Leon.* 1 p. 174.

of one for life, he in the reverſion or remainder may enter without any new admittance.

SECT. VIII.

By what and whoſe act, either of the law, of the copyholder himſelf, or of the lord, ſeverally or all together, the copyhold land or eſtate ſhall be gone, determined, or extinguiſhed; and where ſuſpended only.

HAVING in the ſections before declared where a ſurrender and admittance thereupon, either by the lord or his ſteward in court, or to them, or into the hands of tenants out of court, ſhall be good, and where not: Let us now look upon this diviſion, and ſee in what caſe the copyhold or copyholder's eſtate or intereſt ſhall be ſaid to be gone, determined, or extinguiſhed; and by what and whoſe act it was or may be determined. Firſt, It may be determined by the act of the lord himſelf. 2. By the act of the copyholder. 3. By acts of them both joined together. And laſtly, by the act of the law. All which will evidently appear by the judgments, reſolutions and precedents after enſuing.

Proofs.

Co. 2 part, 17. in *Lane's* Caſe.

The lord by this act cannot, without the concurrent act of the copyholder himſelf, determine the eſtate and intereſt which the copyholder hath in his copyhold. And therefore the ſeverance of the freehold and inheritance of the land holden by copy of court-roll (being done by the act of the lord) doth not determine

termine the copyholder's eſtate, or extinguiſh the copyhold. For although that the eſtate of the copyholder be but an eſtate at will, *viz.* * *ad voluntatem domini ſecundùm conſuetudinem manerii*; yet cuſtom hath ſo eſtabliſhed the eſtate of the copyholder, that he is not removeable at the will of the lord, ſo long as he performs the cuſtoms and ſervices. *Co.* 4 part, 21. in *Brown's* Caſe.

If a copyholder will join with the lord in a deed or feoffment of the manor, there, by that act of them both, the copyhold is extinct; as it was ſaid by the lord *Anderſon* chief juſtice, *P.* 24 *Eliz. in Co. B.*

A feme ſole was lady of a manor, to which were divers copyholders: One of the copyholders did intermarry with the ſeignioreſs of the manor. It was the opinion of the juſtices, That the intermarriage was only a ſuſpenſion of the copyhold, and not an extinguiſhment of it. But afterwards they joined in ſuffering a common recovery of the land; and upon that their act it was reſolved, that the copyhold was extinguiſhed. *Vid. Cro.* 1 part, 5. acc.

Huſband and wife copyholders in fee to them and their heirs: The huſband for money obtained an eſtate of freehold to him and his wife, and the heirs of their bodies. It was reſolved in that caſe, That by the acceptance of the new eſtate the copyhold was determined. *H.* 26 *Eliz.* in *C. B Cro.* 1 part, *Stockbridge's* Caſe.

If a copyholder doth ſurrender to him who hath a leaſe for years of the manor to the uſe of the ſame leſſee, by that act of his the copyhold eſtate is extinct. *M.* 29 *Eliz.* in *C. B. Godb.* 101.

* *At the will of the lord, according to the cuſtom of the manor.*

P. 30 *Eliz. B. R. Leon.* 1 part, 102. *Wakeford's* Caſe.

The lord of a manor ſold the freehold of a copyhold unto another, and ſo it was divided from the manor: and afterwards the copyholder did releaſe to the purchaſer. It was the opinion of the juſtices, That by this releaſe the copyhold was gone and extinct. But in that caſe it was ſaid, That if a copyhold be ouſted, ſo as the lord of the manor is diſſeiſed, and the copyholder releaſeth to the diſſeiſor, *nihil operatur* by ſuch releaſe.

A copyholder had common by uſage in the waſtes of the lord as to his meſſuage and lands belonging: The copyhold comes to the lord, who after grants the ſame to the copyholder * *cum pertinentiis.* In this caſe it was holden, That theſe words, *viz.* (* *cum pertinentiis*) could not create a new common, and the common firſt holden was by cuſtom annexed to the cuſtomary eſtate, and was abſolutely extinguiſhed.

M. 9 *Jac.* in *C. B.* adjudged acc.

If there be leſſee for life, the remainder for life of a copyhold, and the firſt tenant for life purchaſeth the freehold of the copyhold, and afterwards levieth a fine thereof, and five years paſs: It was adjudged, That in that caſe by the fine levied the copyhold was not gone nor deſtroyed, and that this fine was not a bar to him who was in remainder in life of the copyhold.

P. 8 *Jac.* in *Co. B. Moore* and *Rideval's* Caſe *ant.*

There was tenant for life of a copyhold: The lord granted the reverſion of the copyhold after the determination of the particular eſtate to another for 20 years: Afterwards the copyholder, who was tenant for life, by deed made a leaſe for life of his copyhold, and made livery, which was a forfeiture of his copyhold

* *With the appurtenances.*

eſtate

eſtate. It was the opinion of the juſtices in that caſe, That this act of the tenant for life was not a determination or an extinguiſhment of the copyhold: For although it was a determination of the particular eſtate of the copyholder, and that he in the remainder might enter; yet the land remained copyhold as it was before.

The cuſtom of a manor is, That if a copyholder in fee dieth ſeiſed, his wife ſhall hold the land during her life as free bench: the lord enfeoffeth the copyholder of the land. It was adjudged, That ſhe ſhould not hold the land for her life as free bench, but it was gone by the purchaſe. Contrary, if the lord had infeoffed a ſtranger of the land. *3 Jac. in B. R. Laſhmor* and *Averie's* Caſe, *Cro.* 2 p. 126.

C. purchaſed a copyhold from *A.* lord of the manor, to him and his wife and their child for their lives: Afterwards *A.* by indenture granted the freehold to *B.* for life, rendering rent, and made livery: and afterwards *A.* levied a fine *ſur conuſans de droit*, &c. to *C.* of the ſame lands, who afterwards accepted of the rent from *B.* It was holden in that caſe, That by the acceptance of the rent from *B.* the copyhold of *C.* was deſtroyed and determined. *Vid.* 30 *H.* 8. *Dyer*, acc.

Note; If a copyholder takes a leaſe for years of his copyhold lands, the copyhold is determined: and ſo it is, if the lord leaſeth a copyhold for years which is eſcheated, the copyhold is determined. But if a copyholder purchaſeth the manor, the copyhold is not determined, but ſuſpended, becauſe there is no interruption, but it is able to be granted again, becauſe by the cuſtom it ſufficeth that it hath been demiſed and demiſable. *M.* 15 *et* 16 *Eliz. in Co. B.*

SECT. IX.

Of forfeitures of copyhold, and copyhold eſtate; and what acts or things done by the copyholder ſhall amount unto or be adjudged a forfeiture of the copyholder's eſtate, what not.

THE general grounds of forfeitures of copyholds, or of their eſtates are declared in the former part of this treatiſe, unto which I ſhall refer you. That which I ſhall now ſay is but by way of amplification of thoſe grounds, with ſome judgments and authorities in ſeveral caſes upon ſundry differences. All forfeitures may be reduced unto theſe heads: Either voluntary acts done to the prejudice of the lord, or negligent or wilful refuſal to do and pay his duties and ſervices to the lord, which by the laws and cuſtoms of the manor he ought to do and perform.

Proofs.

Coke 4 part, *Murret's* Caſe. A copyholder makes a leaſe either for life or years of his copyhold lands, which is not warranted by the cuſtom of the manor: now although ſuch leaſe ſhall be a good leaſe as betwixt the copyholder and his leſſee, and he ſhall not avoid his own leaſe; yet as unto the lord it is a forfeiture of the copyhold and of his eſtate, and the lord ſhall take advantage of ſuch forfeiture, and may enter upon the lands leaſed.

H. 37 *Eliz. Eaſt* and *Harding's* Caſe. *Cro. El.* 498. So if a copyholder makes a leaſe of his copyhold for 3 years by word, to begin at *Michaelmus* or at a day to come; although it is a good

good leaſe as betwixt the parties to it, yet it is a forfeiture of the copyhold to the lord; and ſo it was holden *Hil.* 37 *Eliz.* in *Eaſt* and *Harding*'s caſe.

A copyholder of a manor made a leaſe of his freehold lands for 10 years, and, to avoid a forfeiture, made a leaſe of his copyhold lands for one year; but covenanted with his leſſee, that he ſhould enjoy the copyhold lands * *de anno in annum*, during the 10 years. It was the opinion of the juſtices in this caſe, That becauſe this demiſe of the copyholder was but for one year, and ſo warranted both by law and cuſtom, and it was but only a covenant on the part of the leſſee, that he ſhould hold it for a longer time, that this was no forfeiture, although the lord pretended the ſame to be a forfeiture. *P.* 10 *Jac.* in *Co. B.* the lady *Mountague*'s Caſe, *Cro.* 2 part, p. 301. acc.

The lord licenſed his copyholder to make a leaſe of his copyhold lands for 21 years, to begin at *Michaelmas* following: The copyholder by indenture made a leaſe accordingly; but afterwards, before *Michaelmas*, he made another leaſe by indenture to another perſon, to begin at *Michaelmas* following. It was the opinion of the lord *Anderſon* chief juſtice, *Mich.* 27 *Eliz.* in *Co. B.* That the making of this ſecond leaſe, being without the licence of the lord, was a forfeiture of his copyhold. *M.* 27 *Eliz.* in *Co. B.* by *Anderſon.* *Moore* 184.

A copyholder for life hath licence of the lord to make a leaſe for 3 years, if he ſo long live, and he makes a leaſe for 3 years without ſuch limitation. It was holden to be no forfeiture of his eſtate in the copyhold, becauſe *M.* 15 *Jac.* in *B. R. Worledge* and *Bamburie*'s Caſe, *Cro.* 2 p. 436.

* *From year to year.*

the

the law makes ſuch a limitation to the eſtate which he makes, that it ſhall continue but during his life. But if he had been a copyholder in fee, it had been a forfeiture of his eſtate to have made ſuch an abſolute leaſe, becauſe he had done more than he was licenſed to do by the law. And ſo it was adjudged in *Hall* and *Arrowſmith*'s caſe, which ſee in *Popham*'s reports 185.

M. 8 *Jac.* in *B. R. Ward*'s Caſe.

If a copyholder without licence of the lord doth erect a new houſe upon his copyhold lands, ſome opinion hath been, That the ſame is a forfeiture of his eſtate. But I doubt much of that caſe, becauſe the act done is for the benefit and advantage of the lord, and not to his prejudice. *Quære* of it.

SECT. X.

Where denial or refuſal to pay his rent, fine, or to do his other cuſtoms and ſervices, ſhall be a forfeiture of his copyhold and copyhold eſtate, and where not.

Proofs.

H. 33 *Eliz. Criſpe* and *Fryer*'s Caſe, in *Moore* 350.

A COPYHOLDER in fee was ſeiſed of land rendering rent at *Michaelmas* and our *Lady-day*. The lord at the laſt inſtant of the day of payment demanded the rent upon the land, and the copyholder was not there, nor any for him, to pay it. It was a queſtion, if his nonpayment of the rent was a forfeiture of his copyhold or not. And the better opinion of the court ſeemed to be, That it was a forfeiture, becauſe the copyholder was to take peremptory notice of the day of payment of his

his rent, and his not being there ſeemed to imply that it was a voluntary denial, or refuſal at the leaſt, of doing the ſame. But *quære* of it; for it was reſolved in another caſe, *Tr.* 21 *Jac. in C. B.* That not payment of rent, or of the fine upon admittance to his copyhold, was no forfeiture of his copyhold eſtate, without there was ſome expreſs verbal denial of it, which there was not in this caſe.

Tr. 21 *Jac. in Co. B.*

A copyholder ſeiſed by force of ſeveral copies of *Black-acre* by the rent of 4 *d. White-acre* by the rent of 4 *d.* and *Green-acre* by the rent of 6 *d.* denied the rent of *Black-acre.* In that caſe it was holden to be a forfeiture of that acre, but no forfeiture of the other two acres, becauſe although they were all in one hand, yet becauſe they were holden by ſeveral rents, the forfeiture of the one acre cannot be the forfeiture of the other two acres.

M. 37 *Eliz. B. R. Tavernor* and lord *Cromwel's* Caſe, *Cro. Eliz.* p. 353.

No fine is either due or payable to the lord, but either upon a deſcent, or upon an admittance, But if ſuch a copyholder upon his admittance ſhall make an abſolute refuſal to pay the fine to the lord, the ſame is a forfeiture of his copyhold and of his eſtate. But there ſuch a fine muſt be reaſonable. For if the fine aſſeſſed by the lord be an unreaſonable fine, (of which the judges ſhall determine) a refuſal or denial of the copyholder to pay the ſame ſhall be no forfeiture of his eſtate or copyhold.

Vid. Coke 4 part, 28. in *Sandi's* Caſe.

Note; It was reſolved by the juſtices, That if the lord demandeth an unreaſonable fine of his copyholder, and he refuſeth to pay it, it is no forfeiture; otherwiſe where it is a reaſonable fine. If a fine be certain, the tenant is to bring it with him to the court, and to pay it

M. 43 *Eliz. Dalton* and *Hamond's* Caſe, *Moore* 622.

it before admittance; and if he be not ready to pay it, it is a forfeiture; and ſo it was adjudged. But what ſhall be a reaſonable fine or an unreaſonable fine, ought to be determined * *per arbitrium boni viri*; and the court and juſtices of it ſhall be judges of the reaſonableneſs of the ſame; if it be pleaded that the fine demanded by the lord, or the diſtreſs for it, be unreaſonable or exceſſive.

M. 6 Jac. in C. B. Willowes and *Willowes* Caſe, 13 *Coke* p. 1.

A copyholder ſeiſed of copyhold lands of the yearly value of 53*s.* 4*d.* *per annum*, and no more, ſurrendered them into the hands of the lord of the manor to the uſe of *J. S.* and his heirs: The cuſtom of the manor was, That upon the admiſſion of any perſon a reaſonable fine ſhall be aſſeſſed by the lord or his ſteward to be paid. The ſteward at the court holden for the ſaid manor aſſeſſed a fine of 5*l.* 6*s.* 8*d.* (the value of the lands for 2 years) to be paid by *J. S.* for a fine; which fine being requeſted of him by the lord to pay, he refuſed to pay the ſame; whereupon the lord entered upon the lands for a forfeiture. In which caſe theſe points were reſolved. 1. That if the fine aſſeſſed had been reaſonable, yet a certain time was to be ſet, and a certain place where it ſhould be paid: for it ſhall not be intended that the tenant hath ſufficient money about him to pay a fine which is uncertain to be aſſeſſed. 2. That the fine aſſeſſed by the ſteward was an unreaſonable fine: and 3. That the refuſal was no forfeiture.

If the fine of a copyholder be aſſeſſed by the lord or his ſteward, be the fine reaſonable or

* *By the opinion of a good man.*

unreaſonable, the lord muſt demand the fine of the copyholder before he can enter upon the copyhold for not payment thereof, and the reaſonableneſs or unreaſonableneſs thereof ſhall be adjudged by the court. *H.* 13 *Jac. C. B. Denny* and *Lemon*'s Caſe *Hob.* 135. *Co.* 11 part, *Godfrie*'s Caſe *acc.* P. 42.

Lands being cuſtomary lands, and by the cuſtom deſcendable to the younger ſon, the father died, the younger ſon being of the age of 2 years: Thirty years incurred after the death of the father, and no court had been holden for the lord of the manor: But in the interim the younger ſon had made a leaſe of the lands to a ſtranger; and after, at the next court holden for the manor, he came into court and prayed to be admitted, but the ſteward refuſed to admit him. It was holden in this caſe, That the leaſe made by him was good, and that there was no negligence in him to be admitted to the copyhold eſtate; for that it was holden in this caſe, That if a copyholder dieth, his heir within age, he is not bound to come at any court during his nonage to pray admittance, or to tender his fine for the ſame; and if the death of the anceſtor be not preſented, nor proclamations made that the heir come in to take up the land and pay his fine, the heir ſhall not forfeit his land for ſuch neglect, although he be of full age. *P.* 30 *Eliz. B. R. Rumney* and *Eves*'s Caſe, *Leon.* 1 part, 100.

If the homagers in a court-baron being copyholders do refuſe to make their preſentments, it is a forfeiture of their copyholds: and ſo it was reſolved to be by both the chief juſtices in the *Star-chamber* in the earl of *Arundel*'s caſe. 4 *Eliz. Dyer* 211.

A copyholder came not to the lord's court of the manor to do his ſuit and ſervice by the ſpace

H. 13 *Jac. B. R. Belfield* and *Adams*'s Caſe, *Bulſtr.* 3 part, 81.

ſpace of 3 years together. The queſtion was, if it was a ſufficient cauſe of forfeiture of his copyhold. It was ſaid by the court, That it was no cauſe of forfeiture, if a warning be not given by the lord of the time of his court to be holden, and notice thereof given to the copyholder himſelf; and the withdrawing of his ſuit by a copyholder is only fineable: but if he doth deny to do his ſuit and ſervice, then it is a forfeiture of his copyhold: and ſo was it adjudged *M.* 14 *Jac. in B. R.* in *Hammond and Winibank*'s caſe.

H. 36 *Eliz. in Co. B. Godb.* 142.

Vid. M. 30 *Eliz. C. B.* Sir *John Branche*'s Caſe, *Leon.* 1 Part, 104. Where general Warning of a Copyholder to appear at the Lord's Court given within the Pariſh ſhall be ſufficient, where not.

Summons was given at the church door for a copyholder to appear at the lord's court, and do his ſuit and ſervice; upon which ſummons he did not appear. The doubt was, if it was a cauſe of forfeiture of his copyhold. It was the opinion of the whole court, That it was no cauſe of forfeiture of his copyhold, becauſe that it was not ſhewed that it was the cuſtom to make ſuch ſummons: and the court ſaid, That it were hard to make it a forfeiture, becauſe perhaps the copyholder had not notice of it: and they held that in ſuch caſe notice muſt be given to the perſon, and his refuſal muſt be a wilful refuſal.

H. 25 *Eliz. in B. R. Burneford* and Sir *John Packington*'s Caſe, *Leon.* 1 part, 1.

The cuſtom of a manor was, That if a copyholder died ſeized, his wife ſhould hold his lands as her Free Bench, and be admitted tenant, and that the ſon ſhould not be admitted tenant during the life of his mother: and farther the cuſtom was, That if any copyholder committed felony, and it were preſented by the homage, that the lord might ſeize the copyhold as forfeit: The copyholder died; his wife was admitted to her Free Bench: The

ſon

ſon committed felony; the wife died. The queſtion was, if the lord might ſeize the copyhold as forfeit. It was objected, He could not, for that the ſon was not tenant at the time of the forfeiture committed, and ſo the lord could not then ſeize, and the cuſtom ſhould be taken ſtrictly. But notwithſtanding it was reſolved, That the lord ſhould have the land as forfeit, and that the ſon was a copyholder within the intent of the cuſtom.

If huſband and wife be joint copyholders of the purchaſe of the huſband; during the coverture the huſband is attainted of felony, and dieth: It is no forfeiture of any part of the copyhold. But if the purchaſe be made before the coverture, then it is a forfeiture of the moiety.

The king being lord of a manor, a copyholder within the manor made a leaſe of his copyhold for 3 lives; and the ſurviving tenant for life continued the poſſeſſion of the lands for 40 years. Though the making of ſuch a leaſe for 3 lives was in law a forfeiture of the copyhold; yet becauſe it did not appear upon the endorſement of the deed that livery was made, it was holden, That the king could not take advantage of the forfeiture. *M. 5 Jac. in Scaccario, Godb. 269.*

If a copyholder doth bargain and ſell his copyhold lands by deed indented and enrolled, it was reſolved, The ſame was no cauſe of forfeiture of the copyhold of which the lord can take advantage, becauſe the copyhold did not paſs by the deed: and ſo it was ſaid it was adjudged in *London*'s caſe.

So, if a copyholder for life ſurrendereth to the uſe of another in fee, and beſides that makes 4 *Ca.* 23. 35 *Eliz. Bullock*'s Caſe,

makes livery of the land; this is no forfeiture of his copyhold, becauſe the eſtate paſſeth by the ſurrender, and not by the livery.

If a copyholder for life cuts down timber-trees, it is a forfeiture of his copyhold: and ſo it was adjudged in *Belfield* and *Adams*'s caſe. But if a copyholder makes a leaſe for years, and the leſſee cuts down timber-trees, or commits other waſte upon the copyhold lands, the lord cannot enter upon the land for a forfeiture; but in ſuch caſe the lord is put to his action upon the caſe againſt the wrong doer.

SECT. XI.

Where the act of the lord, and what act of his, ſhall diſpenſe with a forfeiture made by his copyholder; where and what not.

Proofs.

Paſc. 5 *Jac. Cro.* 1. part, *Manilie* and *Willington*'s Caſe.

A COPYHOLDER commits waſte, and after the waſte done, the lord accepts of the rent from the hands of the copyholder. *Quære* if it ſhall bar him to enter for the forfeiture. It is a *quære* not reſolved.

P. 5 *Eliz. Moore* 49.

If lands by demiſable to two by copy for life *ſucceſſivè*, and the cuſtom of the manor is, that they may not cut trees: if the firſt of them cutteth down trees, it is a forfeiture both of the eſtate of the preſent tenant for life, and of the eſtate of the other in remainder over.

If a copyholder levies a fine, makes a feoffment, or ſuffers a common recovery which deſtroys the eſtate: in ſuch caſe no acceptance of the rent, or act done by the lord, ſhall be available to make the eſtate again good. But where

where the cuſtom of the manor only is broken; as if the copyholder makes a leaſe of his copyhold lands for more years than one year, or denies to pay his rent, or denies to be ſworn of the homage, or commits waſte: there his eſtate may be afterwards confirmed, and there and in ſuch caſe the acceptance of the rent by the lord will amount to a confirmation of the firſt eſtate.

In ſome caſes, where an eſtate of a copyholder is forfeited by law, yet by cuſtom, and the act of the lord in his court of the manor, the forfeiture may be mitigated, and the land ſhall not be utterly forfeited or deſtroyed. As where the cuſtom is, That for waſte copyhold ſhall be forfeited, a cuſtom for to amerce the tenant for the waſte done, and to diſtrain for the amercement, will be a good cuſtom to mitigate the forfeiture of the copyhold.

The cuſtom of the manor where copyhold tenements were demiſable for lives was, That if any ſuch copyholder ſuffered his meſſuage to be ruined for want of repairing, or by committing of waſte, if the ſame was preſented by the homage, the lord uſed to diſtrain the cattel as well of the copyholder himſelf as of his under-tenant levant and couchant upon the lands for the ſaid amercement. It was objected, That the cuſtom was not good, for that it was an unreaſonable cuſtom, that the under-tenant ſhould be puniſhed for the offence of the copyholder, for the under-tenant is a ſtranger to the cuſtom, and cuſtoms ſhould be taken ſtrictly. But it was reſolved that the cuſtom was good: For by the law, the ſuffering of the copyhold meſſuage to fall to ruin, 17 *Car. in B. R. Thorne* and *Tyler's* Caſe, *Mar.* 161.

or to be waſted, was a forfeiture of the copyhold, and the cuſtom did abridge and mitigate the forfeiture, and the under-tenant for a year was a tenant to the lord, and diſtrainable for the rents and ſervices, and the charge lies upon the land, and not upon the perſon; and therefore it was adjudged, That the cuſtom was good, and the amercement lawful, and the diſtreſs of the cattel of the under-tenant levant upon the land was lawful, all of them being by the act of the lord in his court, and by the cuſtom of the manor, in mitigation of the forfeiture of the land, and ſo for the good of the copyholder.

SECT. XII.

Whether copyhold lands be within the ſtatute of Weſtm. 2. *and may be entailed, or not; and where and by what acts the iſſues in tail may be barred; and ſhall be a diſcontinuance of the eſtate, what not.*

WHETHER copyhold lands are within the ſtatute of *Weſtm.* 2. *cap.* 1. *de donis, &c.* or may be entailed, hath been much controverted, and many judgments and reſolutions have been on both ſides; and it ſeemeth to be a point not fully agreed upon at this day. I ſhall therefore make ſome little mention what hath been ſaid on either ſide, and leave it to the judgment of others. And firſt for the affirmative part, That copyholds are within the ſaid ſtatute, and may be entailed, I ſhall begin with Mr. *Littleton* himſelf. Tenant by copy of court-roll is, ſaith he, where there

there is a cuſtom in a manor time out of mind uſed, that certain tenants within the ſaid manor have uſed to have lands and tenements to them and their heirs in fee-ſimple or in fee-tail: and in that chapter he particularly ſets forth the manner of grants of ſuch eſtates, *viz.* * *Ad hanc curiam venit* A. *de* B. *et ſurſumreddidit in manus domini, &c. unum meſſuagium, &c. ad uſum* C. *de* D. *et hæredum ſuorum, vel hæredum de corpore ſuo exeunt. Habendum ſibi et hæredibus de corpore ſuo exeunt,' &c.* By which it appeareth to be the opinion of Mr. *Littleton*, that an eſtate may and might be of copyhold lands. And herewith agreeth the opinion of Mr. *Plowden* in his commentaries in *Morgan* and *Manxell*'s caſe. But note, that the opinion of Mr. *Littleton* is, That there muſt be a cuſtom of the manor to enable ſuch eſtates of copyhold lands.

It is ſaid in *Coke* 3. part, in *Heydon*'s caſe, That where an act of parliament doth alter the ſervice, tenure or intereſt of the eſtate, either in prejudice of the lord or of the cuſtom of the manor, or in prejudice of the tenants, there ſuch an act of parliament doth not extend to copyholds. And therefore the ſtatute of *Weſtminſter* 2. *de donis*, becauſe it extendeth to the alteration of the ſervice and tenure of the land, and is prejudicial to the lord of the manor, doth not extend to copyholds. But in that caſe it is agreed, That by a ſpecial cuſtom lands might be entailed; for that it might be, that

* A. *of* B. *came to this court, and ſurrendered into the hands of the lord, one meſſuage &c. to the uſe of* C. *of* D. *and his heirs, or the heirs of his body, to hold to him and the heirs of his body.*

upon the creation of the manors lands were given by lords of manors to hold by their tenants by particular ſervices and for particular uſes; *viz.* to ſome to them and their heirs in fee-ſimple, to ſome others to hold to them and the heirs of their bodies begotten, and to ſome others for particular eſtates, as for life, *&c.* and ſuch eſtates having continued in their iſſues time out of mind, cuſtom hath now enabled ſuch eſtates to be of copyholds in tail: and although they have and enjoy ſuch their eſtates, be it either fee-ſimple or fee-tail, yet it is but * *ſecundum conſuetudinem manerii:* and therefore and for theſe reaſons and cauſes, although that copyhold be not or could not be entailed within the general words of the ſtatute *de donis*, *&c.* yet by cuſtom time out of mind uſed, they ſay that copyholds may be entailed.

36 *Eliz.* in the *King's Bench* it was adjudged, That where the cuſtom of the manor was, that lands might be granted unto any in fee-ſimple, in ſuch caſe a grant of lands unto a man and the heirs of his body was within the cuſtom: For a cuſtom which extendeth to the greater will extend to the leſſer eſtate.

M. 15 *Jac.* *Lee* and *Brown's* Caſe, *Poph.* 128. Tenant in tail of a copyhold ſurrendered the ſame into the hands of the lord, to the uſe of *J. S. &c.* In that caſe 2 queſtions did ariſe. 1. If copyholds were within the ſtatute *de donis*, *&c.* 2. Whether the tail might be cut off by a ſurrender. The court doubted of the firſt point; but the better opinion ſeemed to

* *According to the cuſtom of the manor.*

be,

be. That the ſtatute co-operating with the cuſtom, they might be entailed.

A copyholder had iſſue 3 ſons, *A. B.* and *C.* and ſurrendered his copyhold lands to the uſe of his laſt will, and thereby declared the ſame to be to the uſe of his wife for life, the remainder to *B.* his ſecond ſon in tail, and afterwards to *A.* in fee. It was a queſtion in this caſe, if *B.* had a fee-ſimple conditional in the lands, or an eſtate-tail. For if a conditional fee, then a remainder over of it could not be limited. It was the opinion of *Wray* chief juſtice, That it was an eſtate-tail in *B.* and not a fee conditional, and that cuſtomary lands might be granted in tail. *H.* 31 *Eliz. B. R. Bullein* and *Graunt's* Caſe, *Leon.* 1 part, 174.

A ſurrender of copyhold lands was made within the manor of *Stevenſon*, to the uſe of *J. S.* and the heirs of his body; and after iſſue, he ſurrendered the lands unto another. It was agreed by all the juſtices, That it was a fee-ſimple, conditional at the Common law, and after iſſue, that he might alien the lands. *H.* 34 *Eliz. B. R. not.* 292. *Stanton* and *Barnes's* Caſe, *Cro. Eliz.* 373.

A copyholder in fee of the manor of *Fairchilds* and *Preachers*, 3 *H.* 8. ſurrendered his copyhold lands to the uſe of his eldeſt daughter for life, the remainder to the eldeſt ſon of the ſaid daughter and the heirs-males of his body, the remainder to the right heirs of *A.* the copyholder in fee. In this caſe it was ſaid, That an eſtate in tail could not be of copyhold lands. It was the opinion of *Fenner* and *Popham*, That by equity of the ſtatute *de donis* an eſtate-tail might be of copyhold lands, though not otherwiſe. *M.* 36 *Eliz. B. R. Gravenor* and *Brook's* Caſe, *Popb.* 34.

Now on the other ſide, That copyhold lands cannot be entailed, nor are within the

lutions following.

H. 35 Eliz. in Co. B. it was reſolved by all the juſtices, that copyholds were not within the ſtatute of *Weſtm.* 2. *de donis:* For if they were within that ſtatute, then the lord ſhould not enter nor take advantage of the forfeiture of the copyhold for felony, (the contrary of which was reſolved in *Borneford*, and Sir *John Packington*'s caſe) but the donor; and the ſervices ſhould be done to the donor, and not to the lord of the manor; which is againſt the nature of a copyhold tenure.

H. 35 Eliz. in Co. B. Pitt and Hadley's Caſe, Godb. 386.

Tr. 18 Jac. in Co. B. Roydon and Moulſter's Caſe, Cro. 3 part, 32, 33. Godb. 367. acc.

The caſe was, That a copyholder ſurrendered to the uſe of one in tail, there being no cuſtom to warrant ſuch ſurrender. In this caſe the queſtion was, whether a copyhold might be entailed within the ſtatute *de donis*. It was holden by all the juſtices, That it could not be entailed within the ſtatute, and that for divers cauſes. 1. Becauſe it is not within the letter of the ſtatute, which ſpeaks only * *de tenementis per chartam datis:* and copyholds cannot paſs by deed, but by ſurrender only, as is agreed on all ſides. 2. Becauſe they are not within the meaning of the ſtatute, becauſe that before 7 *E.* 4. 19. they were not of any account in law, being only eſtates at will of the lord † *ſecundum conſuetudinem manerii.* 3. Becauſe the ſaid ſtatute *de donis* provides only againſt thoſe who might make diſinheriſon by fine or recovery, which a copyholder there could not do or make, becauſe that then upon ſuch

* *Of tenements given by charter.*

† *According to the cuſtom of the manor.*

grants

grants in tail the reverſion ſhould be left in themſelves, which could not be, being to the prejudice of the lord of the manor. And alſo 4. becauſe it would be very miſchievous, becauſe then there ſhould be no means to dock or cut off ſuch entails, (common recoveries and fines not being then in uſe) unleſs there were a ſpecial cuſtom to that purpoſe.

Having thus declared and made mention of the ſeveral caſes and reſolutions in this much controverted point, Whether copyhold may be entailed within the ſaid ſtatute *de donis*, *&c.* I ſhall not deliver any abſolute opinion upon the ſame, although I do much incline to the affirmative part, being chiefly led thereunto by the opinion of Mr. *Littleton*, and by the reſolution in *Manxell*'s caſe, and of my lord *Coke* in *Heydon*'s caſe, and a late reſolution in the ſaid point, 42 *Eliz.* in *Eriſh* and *Rives* caſe, where it was adjudged in the court of *Common Pleas*, upon an evidence given in a caſe of copyhold lands within the manor of *Iſleworth Sion* in the county of *Middleſex*; where it was reſolved, That no eſtate-tail could be of a copyhold without a particular cuſtom to warrant the ſame: but if there was ſuch a particular cuſtom within the manor to warrant ſuch eſtates, then by the cuſtom co-operating with the ſtatute (as before is expreſſed) copyhold lands might be well entailed within the ſaid ſtatute.

Admitting then that by an eſpecial cuſtom of the manor lands may be entailed; the next matter to be conſidered of is, By what and whoſe acts the ſaid eſtate ſhall be either diſcontinued or barred, and what ſhall amount to a

diſcontinuance or a bar to the iſſue in tail of ſuch eſtate,

13 *R.* 2. Fits. Judgment 7. In 13 *E.* 2. Fits. Judgment 7. it is ſaid, That the heir who is inheritable to the copy-lands by cuſtom may recover the ſame by plaint in the court of the lord in the nature of an aſſize of *mort-dauncestor*, but he ſhall not have an aſſize of *novel diſſeiſin*: And 15 *H.* 8. tenant by copy 24. The heir of a copyholder tenant in tail ſhall recover the lands in a formedon in the diſcender.

15 *H.* 8. Tenant by copy 24.

The cuſtom of a manor was, That plaints in the court of the lord of the manor have uſed to be in real actions. A recovery was by plaint in the nature of a real action againſt a copyholder being tenant in tail, and a recovery thereupon had. It was holden in that caſe, That the ſaid recovery ſhall be a diſcontinuance to take away the entry of the heir in tail, becauſe ſuch plaints are warranted by the cuſtom, and it is an incident which the law annexeth to the cuſtom, That a recovery ſhall be a diſcontinuance. But *Vide Tr.* 36 *Eliz. in B. R.* in *Dean* and *Rigden*'s caſe. If it had been a ſurrender in court, it had been no diſcontinuance.

36 *Eliz. B. R. Dell* and *Rigden*'s Caſe, *Moore* 358.

In 27 *Eliz.* in a caſe concerning the manor of *Northhall* in the county of *Eſſex*, That if copyhold lands might be entailed within the ſtatute of *Weſtm.* 2. then a cuſtom of a ſurrender of it ſhould be a bar or a diſcontinuance of ſuch eſtate; for as the eſtate might be created by cuſtom, ſo it might be diſcontinued by a ſurrender by cuſtom. And *Tr.* 38 *Eliz. Field* and *Elliot*'s caſe, A ſurrender by tenant in tail of a copyholder in fee makes a diſcontinuance of it. But yet notwithſtanding thoſe authorities

M. 9 *Car. in Co. B. Hill* and *Upchurche*'s Caſe, *Brownl.* 121.

thorities and caſes, I do conceive that a ſurrender is no diſcontinuance of a copyhold eſtate in tail.

If a man be ſeiſed of a copyhold in the right of his wife, or be tenant in tail of a copyhold, and he doth ſurrender to the uſe of another in fee: It was holden in that caſe, That the ſame doth not make any diſcontinuance of the eſtate of the wife or of the eſtate-tail, but that the wife or the iſſue in tail may reſpectively enter into and upon the land. And according to this it was adjudged in *Gravenor* and *Brook*'s caſe before mentioned in 36 *Eliz.* *H.* 30 *Eliz.* *B. R. Knight* and *Footman*'s Caſe. *Leon*, 1 part, 95.

Copyhold lands were entailed, and the copyholder ſurrendered the ſaid lands to the uſe of another man in tail with divers remainders over, and then he died. It was ſaid in this caſe, That it was no diſcontinuance of the tail, but the iſſue in tail, notwithſtanding the ſurrender, might enter. But it was ſaid in that caſe, That if it were a diſcontinuance, that in ſuch caſe a *formedon* in the *Reverter* did not lie by the tenant in tail, becauſe when a copyholder makes a gift in tail, he hath no reverſion, but a poſſibility; and the lord ſhall avow upon the donee for the rents and ſervices, and not upon the donor. 35 *Eliz. in C. B. Lane* and *Hill*'s Caſe, *Godb.* 368.

In treſpaſs it was adjudged, That a ſurrender by tenant in tail of a copyhold was not any diſcontinuance of it, no more than a ſurrender by tenant for life to another in fee was a forfeiture. *H.* 1 *Jac.* *Oldot* and *Level*, *Moore* 753.

If an infant tenant in tail ſurrendereth his copyhold lands to the uſe of a ſtranger, who is admitted, the infant may enter at his full age, becauſe it was not a bar nor a diſcontinuance. *H.* 35 *Eliz.* *Gooles* and *Gran*'s Caſe, *Moore* 597. adjudged, acc.

It

It is not to be diſputed or queſtioned whether a common recovery of lands at the Common law with voucher over and warranty be a bar of lands entailed: It is univerſally received by all learned in the laws of the realm to be a bar of ſuch an eſtate, and the inheritances of a great many perſons of quality and others do depend upon ſuch common recoveries had and ſuffered. But then the queſtion hath been, whether a common recovery had and ſuffered in the court of the lord of the manor ſhall be a bar of an eſtate of copyhold lands entailed: and for that, it will ſtand upon this difference, Where the cuſtom of the manor hath always been, that ſuch a recovery there had ſhall be a bar, where not. For without a ſpecial cuſtom, I do conceive that by a recovery had and ſuffered in the court of the lord of the manor, an eſtate-tail of copyhold lands cannot be barred: But where ſuch a cuſtom is or hath been out of mind uſed, there I conceive that a common recovery had and ſuffered in the court of the manor will bar an eſtate in tail of copyhold lands. I ſhall only put you two judgments and reſolutions to make good this difference, although many others may be alledged.

P. 37 Eliz. in B. R. Clunn and *Peaſe's* Caſe, *Cro. Eliz.* 391.

Upon a ſpecial verdict in an action of treſpaſs it was found, That the lands were copyhold demiſable in tail, with the remainder over in tail: That tenant in tail in poſſeſſion ſuffered a common recovery with voucher in the court of the manor of theſe lands, and afterwards died: But there was not any cuſtom found for ſuffering recovery of ſuch lands in the court of the ſaid manor. It was holden by

by the whole court in that caſe, That the recovery ſhould not bind the tail but upon a recompence in value, and in that caſe the iſſue could not have land in value: Alſo the lord ſhould loſe his fine, and the party to whoſe uſe the recovery was had ſhould hold the lands without admittance or grant from the lord, which is contrary to the nature of a copyhold.

The other caſe was this. Land was demiſable in tail by cuſtom: A copyholder demiſed the land in tail by copy: The copyholder ſuffered a common recovery in the court of the manor with voucher and warranty. The court at the firſt doubted of it, becauſe a warranty could not be annexed to ſuch an eſtate in tail. But yet afterwards it was reſolved, That the recovery there was a bar of the tail. And note, for a concluſion of this point, That at this day, by the cuſtoms of ſeveral manors, common recoveries are had and ſuffered in the courts of lords of manors for the docking and barring of eſtate-tails of copyholds. And much inconvenience would enſue, both if copyholds at this day might not by cuſtom be entailed, and likewiſe if by cuſtom common recoveries had of eſtate-tails with voucher over in the courts of lords of manors ſhould not thereby be docked and barred.

M. 37 Eliz. in B. R. Eylett and *Lane's* Caſe, *Cro. Eliz.* 380.

SECT. XIII.

What things are incident to a copyholder, and what he may take of common right without the grant or licence of the lord: And what acts upon the land ſhall bind the copyholder, what not.

IF a copyholder according to the cuſtom doth ſurrender into the hands of 2 tenants to the uſe of *J. S.* and his heirs, and afterwards the

the copyholder dieth before the preſentment be made of the ſurrender by the tenants, and the lord before the preſentment accepts of the rent of *J. S.* generally, but not as a copyholder: the heir of the ſurrenderor may enter into and upon the lands, and receive the profits thereof to his own uſe, for that nothing veſteth in the ſurrenderee before admittance, and the inheritance of the copyhold is in the heir *quaſi* by deſcent.

Paſch. 45 *Eliz.* adjudged, acc. To have common in the waſtes of the lord is not a thing incident to his copyhold, but is by preſcription or cuſtom of the manor. If therefore a copyholder purchaſeth the inheritance of the land, the intereſt of the common being a thing entire is gone and determined. But if the copyholder doth ſurrender part of his copyhold lands to the uſe of another, who is admitted, yet his whole common is not thereby determined, but he ſhall have common ſtill for the lands not ſurrendered.

9 *H.* 4. tit. Waſte 59. 13 *Coke* 68. A copyholder may take houſe-bote, hedg-bote and plough-bote upon his copyhold lands of common right, as a thing incident to the grant, if it be not reſtrained by a cuſtom, that the copyholder ſhall not take it but by aſſignment of the lord or his bailiff. And if the lord, where the tenant hath ſuch botes, cuts down all the woods and under-woods which are ſtanding and growing upon the lands, to prevent the copyholder of his botes, he may have an action of treſpaſs againſt the lord, as it was reſolved in *Heydon* and *Smith*'s caſe, *Paſch.* 8 *Jac. in Co. B.*

A manor may be copyhold, and holden of another manor by copy of court-roll: and if

ſuch

such a copyhold manor be granted unto *J. S.* and his heirs, *J. S.* may hold a copy court within his said manor without a special grant of it; for that of common right a court-baron or a copyhold court is incident to every manor. *M.* 8 *Jac. B. R. The king* and *Staverton's* Case, *Yelv.* 190, 191.

A lord of a manor grants a copyhold for 3 lives, and afterwards takes a wife: The 3 lives end or determine: The lord enters into the manor, and keeps the copyhold lands in his hands for a time, and then grants the lands over again by copy, and dieth: The wife of the lord enters, and claims dower in it. In this case it was resolved, That the copyholder should hold the lands discharged of the dower, because the copyholder comes and is in the lands by the custom, which is paramount to the title of dower. *P.* 26 *Eliz. C. B. Cham* and *Dover's* Case, *Leon.* 1 part, 16.

A copyholder is seised of lands at common law, and also of lands holden by copy of court-roll, and he by indenture without licence of the lord, makes one lease of both lands, rendering rent. It was said by *Dyer*, That in such case the whole rent is issuing out of the lands at Common law, because the lease as to the copyhold lands was utterly void. *P.* 5 *Eliz.* by *Dyer. Vid. Moore* 50.

If the lord grants to his copyholder the trees growing upon the lands, and which shall after grow, with liberty to cut them down and carry them away; he may justify the cutting of the trees which are growing, and it shall not be a forfeiture of his copyhold, because the lord hath by his grant dispensed with it: But he cannot cut down the trees which shall there after grow, as it was said by *Plowden* and *Popham.* *P.* 12 *Eliz. in B. R. Moore* 94.

If

Paſc. 12 *Eliz. in B. R.* adjudged, acc.

If a copyholder binds himſelf in a ſtatute, his copyhold land ſhall not be extended upon the ſaid ſtatute, becauſe the copyholder in the eye of the law hath an eſtate but *ad voluntatem domini ſecundum conſuetudinem manerii*: But if a man be tenant for life or years of a manor, and a copyhold comes to his hands by forfeiture or other determination, and he binds himſelf in a ſtatute; although the copyhold be after granted, yet it may be extended upon the ſtatute, becauſe the copyhold was annexed to the freehold, and joined with it in the hands of the lord, when the ſtatute was acknowledged and entered into.

M. 5 *Jac. Swayn* and *Beckett's* Caſe, *Moore* 811, 812.

The cuſtom of a manor was, That a copyholder might cut and lop trees for hedge-bote and other neceſſaries: The queen made a leaſe of the manor to *J. S.* with exception of trees: King *James* granted the reverſion to *J. D.* in fee: The aſſignees of the term granted a copyhold to other for 3 lives, *Habendum* to them *ſucceſſivè*: The copyholder cut trees. It was reſolved, That the copyholder was in by the cuſtom paramount the exception, although he took his eſtate after the exception, and therefore might juſtify the cutting of the trees for the hedge-bote and other neceſſaries.

35 *Eliz. Co.* 4 part, 23. *Bullock* and *Dibley's* Caſe, *Moore* 596.

The huſband ſeiſed in fee of copyhold lands in the right of his wife ſurrendered the ſame to another, who was admitted, and afterwards the huſband died. It was adjudged that in this caſe the wife might enter, and ſhe ſhould not be put to her *cui in vita*.

M. 9 *Jac. in Co. B.* adjudged, acc.

If there be leſſee for life, the remainder for life, of a copyhold, and the firſt tenant for life doth purchaſe the freehold of the copyhold,

hold, and levies a fine thereof, and 5 years paſs: It was adjudged, That this fine ſhould bar him in the remainder of his copyhold.

SECT. XIV.

Where the lord of the manor ſhall be chancellor in his own court, to determine the differences which ariſe betwixt copyholders.

A COPYHOLDER doth ſurrender his copyhold lands to *A.* to hold the lands till he hath levied the ſum of 100*l.* upon truſt that afterwards he ſhall ſurrender to the uſe of *B: A.* levies the money, and being required to make the ſurrender to *B.* he refuſeth to do it; whereupon *B.* exhibits his bill to the lord in the court of the manor: The lord there makes a decree, that *A.* make the ſurrender to *B.* which he again refuſeth to do; and thereupon the lord ſeizeth the lands, and afterwards admits *B.* to the ſame. It was the opinion of the whole court in this caſe, That both the ſeizure of the lord, and his admittance of *B.* were lawful, becauſe the lord in ſuch caſes of equity to execute truſts is chancellor in his own court. *H. 23 Eliz. in B. R. 1 Leon. 2.*

If a falſe judgment be given in a court-baron by the ſteward againſt a copyholder, the copyholder in ſuch caſe ſhall not have either a writ of error or a writ of falſe judgment; but he may ſue in the court of the lord by bill, to be relieved againſt ſuch judgment; and the lord as chancellor, may give him relief therein, and ſhall reſtore the land to the party upon the falſe judgment given by the ſteward, and reſtitution made to the copyholder. *Vid. 14 H. 4. 34.*

SECT.

SECT. XV.

Of ſurrenders upon conditions; and where ſuch ſurrenders ſhall be good, where not.

Proofs.

P. 31 Eliz. Co. 4 part, Kite and Queinton's Caſe, p. 25.

A COPYHOLDER in fee ſurrendered out of court his copyhold lands to the uſe of another and his heirs upon condition: At the next court the ſurrender was preſented, but in the preſentment the condition was omitted: He to whoſe uſe the ſurrender was made being dead, the lord admitted his heir. It was reſolved in this caſe, That the preſentment of the ſurrender was void, becauſe it was not made in ſuch manner as the ſurrender was made. But if the conditional ſurrender had been preſented, it had been good, although it was not entered into the court-roll.

Tr. 2 Jac. B. R. Cro. Jac. 306. Hall and Shardbrook's Caſe.

A copyholder ſurrendered his copyhold upon condition, and afterwards by deed he releaſed the condition. Reſolved it was good without a ſurrender, for that a condition or a right cannot properly be ſaid to be determined by a ſurrender, but it may be by a releaſe.

M. 15 E. 3. 13.

The caſe was; Grandfather, father, and ſon: The grandfather died: The father aſſigned dower to the grandmother, being his mother, who ſurrendered it back to the father paying 10 *l. per annum*: The father died; his wife brought dower againſt the ſon and recovered, becauſe the father had the fee and freehold conjoined in the life of the grandmother by the ſurrender. It was reſolved in this caſe, That when the wife of the father doth recover dower,

dower, ſhe ſhall pay to the grandmother ſo much rent as doth belong to her proportion in dower. And in this caſe it was holden, That although the eſtate of a man be conditional and defeaſible upon a bad title; yet the wife ſhall not be ouſted of her dower until the conditional or defeaſible title be defeated. And where huſband and wife are tenants for life, and ſurrender to him in the reverſion, the wife of him in the reverſion ſhall be endowed, and yet the ſurrender is but conditional; for if the wife of the tenant for life overliveth her huſband, the ſurrender is defeaſible: *à fortiori* in caſe where it is not defeaſible, as in this caſe. And it was ſaid in caſe of a ſurrender of copyhold land, where it was conditional, the wife is dowable of it, if the condition do not determine the eſtate in the life-time of the huſband: But a feme is not dowable of copyhold but by cuſtom of the manor.

A copyholder deviſed his lands to his wife for life, and that ſhe ſhould ſell the lands for the payment of his debts; and ſurrendered to the uſe of his will: The copyholder died: His wife ſurrendered the land upon condition to pay 12 *l.* It was adjudged, It was a good ſurrender upon the condition, and that it was a good ſale made by her. *H. 27 Eliz. Cro. Eliz. 68. Bright and Hubbard's Caſe.*

The father, copyholder in fee, ſurrendered his copyhold lands to the uſe of his ſon in fee, upon condition to perform covenants in an indenture: The ſon after admittance ſurrendered to *J. S.* upon condition that if the ſon pay 10 *l.* the ſurrender to be void: The ſon neither pays the 10 *l.* nor performs the covenants in the indenture: The father enters. Reſolved, That *Tr. 33 Eliz. Symonds* and *Lawnd's* Caſe, *Cro. Eliz.* 239.

by the entry of the father both the ſurrenders were avoided, and there the ſon might well enter after the death of his father, and the ſurrender made by him to *J. S.*

33 *Eliz. Co.* 4 part, *Weſtwick's* Caſe, *f.* 28.

If a copyholder doth ſurrender his lands to the uſe of *J. S.* and his heirs abſolutely, and the lord admits the tenant upon condition, it is void; for that after admittance the tenant is in by him who made the ſurrender, and not by the lord.

Tr. 28 *Eliz. in B. R. Cro. Eliz. Burdett's* Caſe, *f.* 48.

The cuſtom was, That a copyholder might out of court ſurrender to the uſe of a ſtranger in fee: The lord of the manor made *J.* his ſteward * *ad exequendum per ſe*, or his ſufficient deputy, who made *A.* his deputy † *pro hac vice* to take a ſurrender of huſband and wife, the remainder in fee: The deputation was farther, *viz.* ‡ *Et ulteriùs faciendum, quantum in me eſt* *A.* took a ſurrender of the huſband and wife upon condition, which condition was afterwards performed and executed. Reſolved in this caſe, That although the authority to take the ſurrender was abſolute, and to be without a condition; yet when *A.* took it upon a condition to be performed, it was a good ſurrender made to him, by reaſon of the words in the deputation, *Et ulteriùs faciendum, &c.*

P. 39 *Eliz. B. R. Oland* and *Burdwick's* Caſe, *Cro. Eliz.* 460.

A woman copyholder § *durante viduitate* ſowed the land, and before ſeverance of the corn ſhe took huſband. Reſolved, That although the eſtate of the wife was incertain, and determined by the limitation, and not by

* *To execute by himſelf.* † *For this turn.*
‡ *And further to do as much as in me lieth.*
§ *During widowhood.*

any

any condition either in fact or in law, that the lord ſhould have the corn ſowed upon the lands.

A copyholder in fee of lands diſcendable in *Borough Engliſh* had 3 ſons, and ſurrendered to the uſe of his will, and thereby deviſed his lands to his middle ſon in fee, upon condition to pay to his 4 daughters, to every of them 20 *l.* at their full age: The eldeſt ſon had iſſue 2 daughters, and died: The middle ſon is admitted, and doth not pay the daughters their ſums at their full ages: The youngeſt ſon entered in the name of the daughters, who diſagreed to it. It was reſolved, That it was a condition, but not broken without demand of their ſums at their full ages; and when they diſagreed to the entry, the entry of the youngeſt brother was not lawful. *H. 2 Jac. B. R. Cro. Jac.* 56. *Curtis* and *Wolverſton's* Caſe.

A copyholder ſurrendered his lands into the hands of the lord, * *Habendum* after his death to the uſe of an infant † *en ventre ſa mier*. Reſolved that a ſurrender to an infant † *en ventre ſa mier* was not good as an immediate ſurrender, for that it cannot begin at a day to come. And whereas a remainder was thereupon limited over, it was holden to be void, becauſe it was to begin upon a condition precedent, (*vid.* the condition) which was never performed; and therefore the ſurrender into the hands of the lord was void, becauſe he takes it but as an inſtrument to convey it over. *M. 13 Jac. B. R. Simpſon* and *Sothern's* Caſe, *Cro. Jac.* 376.

* *To hold.* † *In his mother's womb.*

SECT. XVI.

Where cuſtom which warrants the lord or his copyholder to grant greater eſtates, warrants the grants of leſſer eſtates.

Proofs.

36 *Eliz. Co.* 4 part, *Gravenor* and *Tedd*'s Caſe, *p.* 23.

THE cuſtom of a manor is, That a copyhold eſtate may be granted in fee ſimple. In that caſe it was adjudged, That an eſtate thereof granted to one and the heirs of his body is good, and within the cuſtom; for * *ubi licet quod eſt majus, non debet quod eſt minus non licere.*

39 *Eliz. in B. R. Downs* and *Hopkins* Caſe, *Cro. Eliz.* 323.

The cuſtom of a manor is, That copyhold eſtates may be granted for life or lives: In ſuch caſe a grant is made to a woman † *durante viduitate ſuâ:* And it was adjudged good, and within the cuſtom, for that every grant for life is *durante viduitate*; but every grant † *durante viduitate* is not for life.

H. 34 *Eliz. B. R. Stanton* and *Barnes*'s Caſe, *Cro. Eliz* 373.

The cuſtom of a manor out of mind uſed was, To grant certain lands, parcel of the ſaid manor, in fee ſimple, and never any grant was made to any and the heirs of his body for life or for years; The lord of the manor did make a grant by copy to one for life, the remainder over to another and the heirs of his body. It was adjudged, That the grant and the remainder over was good; for the lord having an authority by cuſtom, and an intereſt withal, might grant any leſſer eſtate: but otherwiſe it is where one hath but a bare authority.

* *Where the greater is allowed, the leſs in that caſe ought not to be refuſed.*

† *During widowhood.*

In

In treſpaſs the iſſue was, if the lord of the manor granted the lands * *per copiam rotulorum curiæ manerii ſecundum conſuetudinem manerii prædict'*. It was given in evidence, that the lord of late at his court granted the lands *per copiam curiæ*, where it was never granted by copy before. In that caſe the jury are bound to find † *quod dominus non conceſſit*, as it was holden by the court. For although ‡ *de facto dominus conceſſit per copiam rotulorum curiæ, non conceſſit ſecundum conſuetudinem manerii prædict'*. But in that caſe it was holden, If cuſtomary lands had been grantable in fee, if the ſame land eſcheat to the lord, and he grant the ſame to another for life, it is a good grant, and warranted by the cuſtom; for the cuſtom which enables him to grant in fee ſhall enable him to grant for life. *P. 29 Eliz. C. B. Kempe and Carter's Caſe, 1 Leon. 55, 56.*

If a copyhold eſtate fall into the hands of the lord by eſcheat, forfeiture, or the like, and the lord make a leaſe thereof for years or life by deed or without deed, or if he make a feoffment of it upon condition, or if the copyhold ſo eſcheated, *&c.* be extended upon a ſtatute or a recognizance, or the ſame land be aſſigned to the wife of the lord in dower; in all theſe caſes the land can never be granted again by copy, becauſe after ſuch diſpoſition thereof it was not demiſeable. But if the interruptions were not lawful, but tortious, as if *M 15 & 16 Eliz. in Co. B.* adjudged, acc.

* *By copy of the rolls of the court of the manor, according to the cuſtom of the manor aforeſaid.*

† *That the lord did not grant.*

‡ *In fact the lord did grant by copy of the court-rolls, yet, he did not grant according to the cuſtom of the manor aforeſaid.*

the lord be diſſeiſed, or if the land be recovered againſt the lord by a falſe verdict, or by an erroneous judgment; yet after the land is recontinued, and the interruption which was wrongful removed, the land is grantable again by the lord by copy.

SECT. XVII.

Who ſhall be ſaid ſuch a lord of a manor as may grant copyhold eſtates; and how long ſuch eſtates ſhall continue; and what perſons ſhall be capable of copyhold eſtates, what not; and what may be granted by copy.

1 *Coke's* Inſtit. 58.

EVERY one who hath a lawful eſtate or intereſt in the manor, be it fee, fee-tail, dower, tenantry by the courteſy of *England*, tenantry for life or years, guardian, tenant by ſtatute merchant or *Elegit*, are ſufficient lords and perſons to grant copyhold eſtates to others. And in ſome ſpecial caſe eſtates in copyhold lands may be granted by ſuch a one who hath no eſtate or intereſt in the manor.

Proofs.

Tr. 1 *Jac. B. R. Shotland* and *Radlen's* Caſe, *Cowen* 115.

A guardian in ſocage held a copy court in his own name, and granted copies in reverſion. Adjudged he was * *dominus pro tempore*, and had an intereſt in the lands; for he might make a leaſe thereof in his own name, and therefore he might both grant copies, and alſo admit copyholders to eſtates before granted. But the bailiff of a manor hath no intereſt in

* *Lord for a time.*

the

the manor, and therefore he cannot grant copies of the land holden of the manor.

The cuſtom of a manor was, That * *dominus pro tempore* might make a demiſe for 2 or 3 lives in poſſeſſion or reverſion: A woman tenant in dower for life of the manor granted a copyhold to *J. S.* and 2 others for their lives, †*habendum poſt mortem* of *A. B.* and died: *A. B.* died. It was holden by the court in this caſe, That the grant was good in reverſion, although it was not executed in the life of the tenant in dower: And *vide*, That the lord of a manor for life, or any other particular eſtate, having intereſt in the manor, might grant copies in reverſion of lands which are holden by copy of court roll, although the grants were not executed in the life of the grantors; as it was adjudged in Sir *Peter Carew*'s caſe. *Quære*: for *Hil.* 14 *Eliz.* in the earl of *Oxford*'s caſe in *Moore* 95. it is not good, unleſs it come in poſſeſſion during the life of the grantor.

P. 41 *Eliz. B. R. Gay* and *Kay*'s Caſe, *Cro. Eliz.* 661.

H. 14 *Eliz.* the Earl of *Oxford*'s Caſe, *Moore* 95.

Note; It was holden by the juſtices *P.* 15 *Jac. in Co. B.* That there ought to be a cuſtom to enable the lord of the manor to make a grant of a copyhold in reverſion.

Generally, things which lie not in tenure, as advowſons in groſs, commons in groſs, or the like incorporate inheritances, out of which a rent cannot be reſerved, cannot be granted by copy of court-roll by the lord of the manor; nor can they be holden by any ſervice to be done for them. But advowſons appendants, commons appendants, and ſuch things as are parcel of a manor, and which have continuance,

* *Lord for a time.* † *To hold after the death.*

may be granted by the lord of the manor to be holden by copies of court-roll, according to the cuſtom of the manor.

M. 38 *Eliz. B. R. Cro. Eliz. Hoe* and *Taylor's* Caſe, *p.* 413.

In treſpaſs for cutting down of under-woods, the queſtion was, Whether under-woods might be granted by copy of court-roll, for that by ſuch grant or leaſe the ſoil paſſeth not. But it was reſolved, That under-woods are a thing of inheritance and perpetuity, which may have continuance for ever; for after they are once cut, they will grow again *ex ſtipitibus*, and ſo they may be well granted by copy.

P. 43 *Eliz. B. R. Sands* and *Drury's* Caſe, *Cro. Eliz.* 814.

In trover and converſion of 20 loads of tithe-hay, the only queſtion was, Whether tithes were grantable by copy. It was objected they were not, becauſe it is againſt the nature of tithes, and none could have a property in them before the council of *Lateran*, and therefore it was impoſſible to have any cuſtom ſo to grant them. But it was reſolved, That they might be granted by copy, if there had been a cuſtom time out of mind ſo to grant them.

39 *H.* 6. 9. *b. Vid. M.* 11 *Jac. Moore* and *Goodgame's* Caſe, *Cro. Jac. p.* 327. *Coke* 11 part, p. 17. Sir *Henry Nevil's* Caſe. *M.* 37 *Eliz. B. R.* Sir *John Bourn's* Caſe, acc.

One manor may be holden of another manor, and may be demiſeable by copy of court-roll, and there may be cuſtomary tenants, according to the cuſtom of the manor; and ſo it was ſaid, That a market or a fair, although they are things of privilege and liberty only, yet becauſe they might be appendant unto or parcel of a manor, or uſed with a manor and lands, that an eſtate might be granted of them by copy of court-roll.

SECT.

SECT. XVIII.

What acts or things are inſeparable, and muſt be done by the copyholder himſelf; and what acts and where may be done by his attorney.

A COPYHOLDER, notwithſtanding that generally and according to the cuſtom of the manor he hath an eſtate of inheritance in his copyhold lands, *viz.* * *ſecundum conſuetudinem manerii*; yet it hath this qualification, that it is † *ad voluntatem domini:* and in that reſpect upon the original grants of ſuch eſtates, the lords of manors did reſerve unto themſelves certain duties and ſervices and ſuits to be done by their copyholders; ſome of which were ſo inſeparable to the perſon of the copyholder, that they could not be done by any other perſon; others were ſuch as concerned and had reſpect both to the lord for his good, and the good of the manor, as thoſe which concerned the particular good of the copyholders themſelves, or the lands which they held of the lord.

The principal duty inſeparably to be done to the perſon of the lord, and by his copyholder, is his doing of fealty, which upon every admittance he is to do to the lord, for that is eſpecially mentioned in the copy granted by the lord in theſe words, *viz.* ‡ *dat domino pro fine, et fecit domino fidelitatem:* and fealty can- *Co.* 9 part, in *Comb's* Caſe, p. 75.

* *According to the cuſtom of the manor.*

† *At the will of the lord.*

‡ *He gives to the lord for a fine, and does fealty to the lord.*

not

not be done but in perſon, and not by an attorney. And although (as Mr. *Littleton* ſaith) fealty may be taken by the ſteward of the court of the lord of the manor, yet it is done to the lord himſelf, and it muſt be done by the copyholder himſelf in perſon.

A copyholder may take an eſtate in the copyhold by the ſurrender of another copyholder into the hands of two tenants of the manor by cuſtom, (as before is declared.) But then this ſurrender muſt be preſented in court, and he to whoſe uſe the ſurrender was made muſt perſonally appear in court, and be there admitted to the land; and he cannot be admitted by attorney.

The ſuit and ſervice which is to be done in the court of the lord by his copyholder muſt be done in perſon, and not by another for him; and it is to be done upon his oath, and a man cannot ſwear by attorney; and therefore he cannot make an attorney to do his ſuit and ſervice, but the ſame muſt be done by him in perſon.

Again, If a copyholder, upon notice given him of the ſpecial day of holding the lord's court, and being ſummoned to appear and to do his ſuit and ſervice, ſhall wilfully neglect, or refuſe to appear and do his ſuit, it is a forfeiture of his copyhold: and therefore ſuch ſuits and ſervices cannot be done by attorney, but in proper perſon.

Tr. 28 *Eliz. in B. R.* the Earl of *Arundel*'s Caſe, *Leon.* 1 part, 36.

A copyholder of a manor of the earl of *Arundel* did ſurrender his lands to the uſe of his will, and thereby deviſed them to his youngeſt ſon and his heirs, who being in priſon made a letter of attorney to *J. D.* to pray to be admitted

ted to the land for his uſe, and after ſuch admittance to ſurrender the ſame lands to the uſe of *J. S.* and his heirs, to whom he had ſold it for the payment of his debts, who came into court accordingly, and prayed to be admitted, and make a ſurrender of the land to *J. S.* all which was done. In this caſe it was reſolved by the juſtices, That it was no good admittance, nor no good ſurrender; for that the heir ought to have come himſelf in perſon in court to take up his land, and afterwards to ſurrender it, or otherwiſe have procured the lord to appoint his ſteward to have gone to the priſon unto him to have been admitted, and afterwards to have ſurrendered the lands.

Some particular things a copyholder may do by his attorney; as he may pay his rent by his ſervant or attorney, or tender it by them; and ſuch payment and tender ſhall be good. So if the cuſtom of the manor be, That upon the death of every copyholder the tenant ſhall pay and render his beſt beaſt unto the lord for a heriot, there the heriot may be paid by the heir before his admittance, or by the executor of the copyholder; and ſuch payment or tender of it ſhall be good.

So by an eſpecial cuſtom within the manor a copyholder may appoint or nominate, in the preſence of two tenants of the manor or other two ſufficient witneſſes, who ſhall have his copyhold lands after his deceaſe, and alſo that they may appoint what fine the lord ſhall have for the admittance of the tenant, ſo it be a reaſonable fine; and ſuch diſpoſition of his lands and appointment of fine ſhall be good by the cuſtom: But yet after ſuch diſpoſition made,

M. 5 *Jac. in B. R. Ball's* Caſe, 4 *Leon.* 237.

made, the party who is to have the land muſt in perſon come into the lord's court, and pray to be admitted unto the ſame. And ſo was it very lately adjudged in the court of *Common Pleas*, both for the point of the cuſtom, that it was a good cuſtom and admittance.

M. 3 *Eliz. B. R.* Sir *John Braunche's* Caſe, *Leon.* 1 part 104.

A copyholder dwelling in a town long diſtant from the manor, having notice of the court-day when it was to be holden, upon ſummons appeared not himſelf, but appointed his ſon his attorney to appear and do the ſervices for him for his copyhold lands. In this caſe it was holden by the court, That ſuch a perſon ſo appointed might eſſoign the copyholder, but not do the ſervices for him, for that none could do the ſame but the tenant himſelf.

SECT. XIX.

What cuſtoms within copyhold manors ſhall be ſaid to be good and reaſonable cuſtoms, and what not.

Coke, 4 part, 21.

CUSTOM is the very ſoul and life of copyhold eſtates; for without cuſtom, or if they break their cuſtoms, they are at the lord's will, for they hold their lands * *ad voluntatem domini*, although (as before is ſaid) it be † *ſecundum conſuetudinem manerii*, *&c.* But then the cuſtoms muſt be reaſonable, and not unreaſonable cuſtoms.

Coke 1 part, Inſtitut. 59.

If the lord doth challenge a cuſtom within his manor, to have a fine of every of his copyholders of the ſaid manor at the alteration

* *At the will of the lord.*

† *According to the cuſtom of the manor.*

or

or change of the lord of the manor, be it by alienation, demiſe, death, or otherwiſe; this is an unreaſonable cuſtom, for by this means his copyholders may be oppreſſed by the lords by the payment of a multitude of fines.

A cuſtom within a manor, That every alienation of lands within the manor ſhall be preſented at the next court holden for the ſaid manor, upon pain that ſuch alienation ſhall be void, is a good and reaſonable cuſtom; for it is but reaſonable that the lord ſhould know who is his tenant. *Coke* 5 part, *Perryman's* Caſe, *p.* 84.

A copyholder alledged a cuſtom within a manor in *Eſſex* to be, That all the tenants within the ſaid manor had uſed to cut down trees, to repair their copyhold and freehold tenements within the ſaid manor, and alſo to ſell their trees at their pleaſures. It was doubted if it was a good cuſtom: but the better opinion of the court ſeemed to be that the cuſtom was good. *Paſch.* 6 *Jac. in C. B. Glaſcock's* Caſe. *Vid.* 4 *Leon.* 238.

The cuſtom of a manor in *Worceſterſhire* was, That if any copyholder committed felony, and that the ſame be preſented by 12 homagers in the lord's court, the tenant ſhould forfeit his copyhold. It was preſented, that *J. S* a tenant of the ſaid manor, had committed felony at ſuch a time; but that at the aſſizes next after he was acquitted of the ſame: After which the lord ſeized the lands. In this caſe it was adjudged, That the cuſtom was not good, becauſe in judgment of law, before conviction or attainder he was not a felon. But whether in that caſe the verdict and finding of the jurors upon the bill of indictment agreeing with the *M.* 6 *Jac. in C. B. Paginton* and *Huet's* Caſe, *Godb.* 267.

the finding of the homagers, that the party had committed felony, did entitle the lord to the copyhold lands, notwithſtanding the acquittal of the jury which was afterwards, was not reſolved.

A copyholder did alledge the cuſtom of the manor to be, That the lord might grant copies in remainder with the aſſent of the tenants, and not otherwiſe, and that copies otherwiſe granted in remainder ſhould be void. It was ſaid, That this cuſtom might be good, for it might be ſo agreed and granted by the lord at the beginning upon the creation of the manor; and that it ſeemed to be grounded upon the reaſon of the Common law, That a remainder ſhould not be without the aſſent of the particular tenant, and to commence with his eſtate, and that therefore it was a good cuſtom. *Quære* the caſe, for it was not reſolved, *M.* 31 *Eliz. in C. B.*

M. 31 *Eliz. C. B. Godb.* 140.

The cuſtom of a manor was, That thoſe who claimed copyholds by diſcent ought to come at the firſt, ſecond, or third court, upon proclamations made, to take up their eſtates, or elſe they ſhould be forfeited. A tenant of the manor (having iſſue inheritable by the cuſtom beyond the ſea) died: The proclamations all paſſed, and the heir did not return in two years; but upon his return he prayed to be admitted to the copyhold, and profered the lord his fine in court, which the lord refuſed to accept of, and to admit the heir, but ſeized the land as forfeited. It was adjudged in this caſe, That it was no cauſe of forfeiture, becauſe the heir was beyond the ſeas at the time of the proclamations, and the lord was at no preju-

H. 7 *Jac. in C. B. Copley's* Caſe.

prejudice, for that, for any thing appeared in the caſe, the lord had taken all the profits of the land in the mean time.

The cuſtom of a manor was, That every copyholder at his death ſhould pay to the lord his beſt beaſt for a heriot: A feme-ſole within the manor tenant for life took a huſband, and died. It was the opinion of *Dodderidge* in this caſe, That although the cuſtom was good, yet, as this caſe was, no heriot ſhould be paid, becauſe the wife had not any goods, by cattel to pay the ſame. *M. 7 Jac. in C. B.* by *Doderidge.*

A cuſtom of a manor was ſaid to be, That the lord had uſed after the death of every one dying within his manor to have the beſt beaſt of ſuch a perſon for a heriot, and to ſeize and diſtrain for it. It was adjudged a void cuſtom, not good to bind a ſtranger: but ſuch a cuſtom to extend to, and bind the tenants of the manor, might be good. *M. 42 Eliz. B. R. Cro. Eliz. 925. Parker* and *Combleford's* Caſe. *Vid. 3 & 4 Eliz. in C. B. Wilſon* and *Wiſe's* Caſe, *Moore*, acc.

The cuſtom of a manor was, * *Quod quilibet tenens per copiam poterit dimittere terras ſuas* for life, in fee, or otherwiſe; and that a woman † *cooperta viro poterit deviſare* her copyhold lands to any other, or to her huſband, by the aſſent of the huſband. In this caſe the court held, That the cuſtom was not unreaſonable; but becauſe it was ‡ *poterit deviſare*, where it ought to have been alledged § *uſi ſunt deviſare*, for that cauſe it was ſaid it was not good. *p. 16. Paſc. 24 Eliz. Moore, Vide Skipwith's* Caſe. *Tr. 33 Eliz. in C. B. Godb. 143.* where the contrary ſeemeth to be adjudged.

Note; by the whole court, That if the cuſtom of a manor is alledged to be, That the

* *That every tenant by copy might grant his lands.*
† *Married might deviſe.* ‡ *Might deviſe,*
§ *Were uſed to deviſe.*

Paſc. 8 *Jac. in C. B. Rapley* and *Chaffyn*'s Caſe, acc. *Godb.* 166.

eldeſt daughter ſhall ſolely inherit the land, ſuch a cuſtom may be good: But then ſuch cuſtom ſhall be taken ſtrictly, *viz.* That the eldeſt ſiſter ſhall not inherit the land by force of the ſaid cuſtom.

Vid. Moore's Rep. 3 *E.* 6. p. 8.

It was reſolved by the juſtices, That a cuſtom that a leſſee for years may hold the land for half a year after his term ended, is no good cuſtom: But it was agreed, That the lord of a copyhold might by cuſtom leaſe the ſame for life and 40 years after, and that ſuch a cuſtom was good.

Tr. 14 *Jac. in C. B. Harbin* and *Green*'s Caſe, *Moore* 887.

A cuſtom was alledged, that all inhabitants of certain meſſuages holden of the biſhop of *S.* had uſed to grind their corn which they uſed to ſpend in their houſes, or ſhould ſell, at certain mills, called *the biſhops mills in S.* and not elſewhere, without the licence of the biſhop. It was the opinion of the juſtices, That it was a void and unreaſonable cuſtom, to grind all their corn there which they ſhould ſell, *&c.*

P. 13 *Jac. Ford* and *Hoſkyn*'s Caſe, *Moore* 842.

The cuſtom of the manor of *Y.* in the county of *Dorſet* was, That every copyholder might name who ſhould have his copyhold, and that the lord ought to admit the copyholder ſo named at the death of the nominator. *Quære* if it be a good cuſtom, becauſe the perſon nominated hath neither *jus ad rem*, *nec in re*, the intereſt being in the lord, and a man cannot gain an intereſt to himſelf from the Lord againſt the will of the lord. And therefore it was holden, That where the party in that caſe brought an action againſt the lord for denying to admit him to the copyhold upon ſuch nomination, the action would not lie. But *quære* that caſe as to he cuſtom, for that in 45 *Eliz.* *in*

in B. R. in *Powel* and *Peacock*'s caſe it was adjudged, That a cuſtom that a copyholder in fee might nominate his ſucceſſor, and ſo *in perpetuum*, was adjudged a good cuſtom. And *vid. Brock* and *Spencer*'s caſe in *Hobart* 6 and 11. a cuſtom that ſuch a copyholder in fee might fell timber-trees was adjudged a good cuſtom.

45 *Eliz. B. R. Powell* and *Peacock*'s Caſe, *Cro. Jac.* 29. *Vid. Hob.* Reports 6. *Brock* and *Spencer*'s Caſe.

The cuſtom of a manor was, That if any tenant allowed his lands holden of the manor by writing or feoffment, or deviſed them, or ſurrendered them into the hands of the lord of the manor to the uſe of another, that ſuch alienation, feoffment, deviſe, or ſurrender ought to be preſented within one year next after. It was ſaid, It was no good cuſtom; but the court ruled the cuſtom to be good and agreeable to the law; for that it is reaſon that the lord ſhould know, *&c. tant. vid.* before.

P. 41 *Eliz. B. R. Parman* and *Bowyer*'s Caſe, *Cro. Eliz.* 668. *Vid.* the ſame Caſe in *Anderſon*'s 2 part, 125. where it ſeemeth the cuſtom was much doubted, if good, or not.

A cuſtom was, That a copyholder of inheritance might make a letter of attorney to two joint-tenants, and ſeverally, to ſurrender his copyhold lands in fee to certain uſes after his death. It was reſolved, That the cuſtom was a void cuſtom, becauſe by the death of the copyholder the lands were ſettled in the heir, and an authority given to deveſt him was not good.

Vid. Wallis and *Bucknall*'s Caſe *in B. R. Style*'s Reports 311.

The cuſtom of a manor was, That the land was deviſable by cuſtom for 21 years, paying the treble value of the rent, and if the leſſee died, that the term ſhould be to his heirs, paying for a fine one year's rent; and if he aſſigned it, the aſſignee to have it for one year's value of the rent, and that he might renew the

M. 21 *Jac. Cro.* 2 part, *Pope*'s Caſe, *p.* 671.

deviſe for 3 years value. The court held all the ſaid cuſtoms to be good and reaſonable.

P. 17 Car. in B. R. Thorne and Tyler's Caſe, Mar. 161.

The cuſtom of a manor was, That if any copyhold tenant did ſuffer his meſſuage to be ruined for want of reparations, and the ſame be preſented in court by the homage, that ſuch a tenant ſhould be amerced, and that the lord had uſed to diſtrain the beaſts as well of the under-tenant as of the tenant himſelf, which were levant and couchant upon the lands, for ſuch amercement. It was ſaid, That the cuſtom was not good, but unreaſonable, to diſtrain a ſtranger's cattel, ſuch as the under-tenant was. But it was reſolved that the cuſtom was good: for the under-tenant, although he was but tenant for a year, yet he ſhould have all the benefit and privileges which the copyholder himſelf ſhould have had; * *et qui ſentit commodum ſentire debet et onus*; and he is diſtrainable for the rents and ſervices due and payable to the lord; and the charge lies upon the land, and not upon the cuſtom: and therefore the cuſtom is good.

H. 17 Eliz. B. R. Brown and Foſter's Caſe, Cro. Eliz. acc. p. 392.

The cuſtom of a manor was ſhewed to be, That any copyholder of the manor may ſurrender within any place of the manor into the hands of two tenants; and if a ſurrender be to the uſe of a ſtranger, without expreſſing any eſtate, that the lord might grant it in fee to him to whom the ſurrender was made. It was objected, That the cuſtom was unreaſonable, becauſe it is to charge the land with a greater eſtate than the copyholder gave. On

* *And he who reaps the advantage, ought alſo to bear the burthen.*

the

the other ſide it was ſaid, That the cuſtom was good; for that the lord is chancellor in his own court, and might diſpoſe thereof when the tenant leaves it uncertain. *Quere*; for the caſe was not reſolved.

SECT. XX.

Where and in what caſe a copyholder or his leſſee upon an ouſter may have and maintain againſt the ejector an ejectione firmæ, *and where and in what not.*

Proofs.

IN *ejectione firmæ* the caſe was, The plaintiff was leſſee for years of a copyhold; and the cuſtom of the manor was, That a copyholder might let the land for 3 years. It was the opinion of *Anderſon* chief juſtice, That the leſſee of a copyholder cannot maintain *ejectione firmæ*; but if he might, he ought to ſhew his leſſor's eſtate, or his licence, or a ſpecial cuſtom, to warrant it. *H.* 38 *Eliz. C. B. Wells* and *Partridge*'s Caſe, *Cro. Eliz.* 469.

A copyholder made a leaſe for years by indenture warranted by the cuſtom. It was adjudged, That the leſſee ſhould maintain *ejectione firmæ*; although it was ſtrongly objected, That if it were ſo, then the plaintiff ſhould have an *habere facias poſſeſſionem*, and ſo copyholds ſhould be ordered by the laws of the land. *M.* 14 & 15 *Eliz. Leon.* 1 part, 4.

The cuſtom of a manor was, That if any copyholder of inheritance died, his heir within the age of 14 years, then the lord of the manor might grant the cuſtody of his body and lands to whom he pleaſed: A copyholder of inheritance died, his heir within the age of 14 *P.* 33 *Eliz. in B. R. Cole* and *Wall*'s Caſe, 1 *Leon.* 328.

years: The lord committed the cuſtody of his body and lands to J. S. who, being ejected, brought a writ of *ejectione cuſtodiæ* of his body. It was the opinion of the juſtices, That the action did not lie. But it was agreed in that caſe, That an *ejectione firmæ* lieth upon a demiſe of copyhold lands by leaſe for years by the copyholder himſelf, but not upon a demiſe by the lord of the copyhold.

Coke 4 part, 26. in *Melwiche's* Caſe. *M.* 8 *Jac. in C. B. Cramporn* and *Freſhwater's* Caſe, acc. 1 *Brownl.* 133. *H.* 39 *Eliz. Cro. Eliz.* 535. *Goodwin* and *Langburſt's* Caſe, acc.

Note; It was reſolved by the juſtices, That the leſſee of a copyholder for a year may maintain an *ejectione firmæ*: for inaſmuch as his term is warranted by the law by force of the general cuſtom of the realm, it is but reaſon that if he be ejected, he ſhould have an *ejectione firmæ*; for it is a ſpeedy courſe for a copyholder to gain the poſſeſſion of the land againſt a ſtranger, being no more than what right requires to be yielded him for the recovery of his eſtate.

SECT. XXI.

What ſtatutes and acts of parliament do extend to copyholds and copyhold eſtates, what not.

SOME things concerning this diviſion being ſpoken of in the former part of this treatiſe, and ſome particular ſtatutes there being mentioned within which copyholds are included, and in what not, I ſhall refer the reader thereunto; adding only a few caſes upon ſome particular acts not therein mentioned, with the authorities and reſolutions of the juſtices therein. And as concerning within what ſtatutes copyholds are, I ſhall take and rely upon the general rule, which is put in Sir *Edward*

ward Coke's 3. part of his reports, in *Heydon*'s caſe, *viz.* When a ſtatute or act of parliament doth alter the ſervice, tenure, intereſt of the eſtate, or other thing in prejudice of the lord or of the cuſtom of the manor, or in prejudice of the tenant, there the general words of ſuch ſtatute or act of parliament do not extend to copyholds or copyhold eſtates: But when the ſtatute or act of parliament is generally made for the good of the commonweal, and no prejudice can come thereby, by alteration of any ſervice, tenure, or intereſt, or cuſtom uſed within the manor, there copyholds and copyhold eſtates are within the purview of ſuch ſtatutes or acts.

Coke 3 part, *Heydon*'s Caſe, P. 7.

Proofs.

It was reſolved by all the juſtices, that no tenure ſhall pay for a reaſonable aid to make the eldeſt ſon knight, or to marry the eldeſt daughter, but tenure by knight's ſervice or tenure in ſocage. Now *Littleton* ſaith, that all tenures are either knight's ſervice or ſocage: And the ſtatute of *Weſtm.* 1. *cap.* 36. of reaſonable aid extends only to ſuch tenures. The queſtion then is, Whether a copyhold tenure be within that ſtatute. I ſhall not determine the queſtion, for that I do not find it moved in any book of the Common law: But although I humbly conceive copyholds be within the general words of Mr. *Littleton*, (all tenures in ſocage;) yet that the ſaid ſtatute of *Weſtm.* 1. *cap.* 36. doth not extend to copyholds. *Quære* of it.

6 *Jac. in Co. B.* 13 *Coke* 27, 28.

Littl. 16. ſect. 36.

The ſtatute of *Weſtm.* 2. *de donis conditionalibus* I conceive doth not extend to copyholds within the general words thereof. The words

Statute *Weſtm.* 2. *de donis.*

of the ſtatute are of gifts * *per chartam datis*; and copyholds do not paſs by deeds, but by ſurrenders. But yet it is conceived, that although they be not within the general words of the ſtatute, yet they are within the equity of the ſaid ſtatute, if there be a cuſtom to warrant ſuch eſtates.

H. 37 Eliz. in Co. B. Church and *Wyatt's* Caſe, *Moore* 637.

The caſe was, A copyholder in fee ſurrendered his copyhold lands to the uſe of his will; and having a daughter born, and his wife with child, he deviſed part of his ſaid lands to his ſon or daughter which his wife went with, † *et hæredibus ſuis legitimè procreatis*; and the reſidue thereof he deviſed to his daughter born, to have to her and the fruit of her body. One point in this caſe was, What eſtate the daughter born had in the ſaid copyhold lands, if in tail or not. It was ſaid, It was a fee-tail in the daughter born. But it was much doubted if it was an eſtate within the ſaid ſtatute *de donis &c.* But in that caſe it was agreed, That copyhold might be entailed by cuſtom co-operating with the ſaid ſtatute, and if not within the words, yet within the equity of the ſaid ſtatute.

Stat. *Prærogat. Regis*, cap. 9 & 10. 8 *Co.* 170. *in Touron's* Caſe, 4 *Co.* 127. in *Beverly's* Caſe.

The ſtatute of *Prærogativa regis cap.* 9. and 10. gives the lands of idiots natural to the king, he finding them convenient maintenance out of the profits thereof; But if the idiot hath copyhold lands deſcended unto him, the king ſhall not have the wardſhip of thoſe lands therewith, out of the profits thereof to maintain the idiot, becauſe the ſame would be prejudicial to the lord of the manor, of whom the lands are

* *Given by charter.* † *And to his heirs lawfully begotten.*

holden

holden by copy. But yet all alienations made by an idiot of his copyhold lands, after office found, ſhall be avoided by the king.

Copyhold lands are not within the ſtatute of Weſtm. 2. cap. 20. *of* Executions. Stat. *Weſt.* 2. *cap.* 20.

For if a judgment he had in a court of record againſt a copyholder for debt and damages, although the plaintiff may have execution by *Fieri facias* againſt his goods, or a *Capias* againſt his body; yet he cannot have execution of the moiety of his copyhold lands by *Elegit*, for that copyhold lands are not within that ſtatute. And ſo it is, if a ſtatute merchant or ſtaple be acknowledged by a copyholder for the payment of money at a day certain, which is not paid, his copyhold lands are not extendable for the ſame. And the reaſon of theſe caſes is, becauſe no perſon can come to copyholds but by admittance of the lord; and the lord ſhould thereby loſe his fine which is due upon admittance, if the party might have the lands upon extent delivered unto him. *Sav.* 67. *pl.* 138. *Rol. abr.* 888. *Cro. Car.* 44. *Hardr.* 433. *Old Benl.* 163. 3 *Co. Rep.* 9. 6 *Vin. Abr.* 169. *pl.* 4. 3 *Read Stat. Law* 123. 2 *Inſt.* 396. *Gilb. Ten.* 185. *Coke's Copyhold*, ante.

If tenant by the courteſy, or leſſee for years, be of a manor, and copyholds were in his hands by forfeiture or other determination, and he bindeth himſelf in a ſtatute, and afterwards he deviſeth the copyhold again; the copyhold ſhall be liable to the ſtatute. But if a copyholder bindeth himſelf in a ſtatute merchant or ſtaple, his copyhold lands ſhall not be extended upon the ſaid ſtatute, becauſe therein he hath but an eſtate at will. *Paſc.* 22 *Eliz. in Co. B. Moore* 94.

Copyhold lands are not within the ſtatute of 31 H. 8. cap. 13. *of* Monaſteries. 31 *Stat.* 31 *H.* 8. *cap.* 13.

The guardians of the college of *Otlery*, lords of a manor, granted lands for 3 lives by copy,

M. 25 *et* 26 *Eliz. in the Exchequer,* 1 *Leon.* 4.

according to the cuſtom of the manor; afterwards in 30 *H.* 8. they leaſed the lands to *J. S.* rendering the accuſtomed rent, and afterwards ſurrendered their college to king *Hen.* 8. And if the leaſe, being within one year of the ſurrender, was within the ſtatute or not, was the queſtion. The caſe is not adjudged, but a *quære* made of it. But in that caſe it was adjudged, That if there be lord of a copyholder for life, and the lord grants a rent-charge out of his manor, of which the copyhold is parcel, and then the copyholder doth ſurrender to the uſe of another, who is admitted; he ſhall not hold the lands charged; but if he dieth, ſo as his eſtate is determined, and the lord grants the land to another *de novo* to hold by copy, the new tenant ſhall hold the land charged.

Copyhold lands not within the ſtatute of 32 H. 8. *of* Rents.

Tr. 27 *Eliz. in B. R. Rot.* 1201. *Sands* and *Hempſtone's* Caſe, *Leon.* 2 part, 109.

The lord of a manor (of which there were copyholds) granted a rent-charge for life, and afterwards made a feoffment of the manor to *J. S.* and his heirs, who granted a copyhold for life: *J. S.* died, and the rent was behind, and the grantee of the rent diſtrained for the arrearages. It was reſolved in that caſe, That the poſſeſſion of the copyholder was not chargeable to the diſtreſs, for that the copyholder was not in by him who immediately ought to pay the rent, but in the poſſeſſion of the land by the cuſtom. But *quære* that caſe: and *vide Hil.* 18 *Eliz. in Co. B.* the earl of *Weſtmorland's* caſe. For there the caſe was, That the demeſnes of a manor were uſually let for lives by copy, and the lord granted a rent-charge to

Hil. 18 *Eliz. in Co. B.* the earl of *Weſtmoreland's* Caſe, *Leon.* 3 part, 59.

J. D.

J. D. * *pro consilio impendendo* for life, and afterwards conveyed the manor to *J. N.* in tail: The rent was behind, and the grantee of the rent died, and the executors of the grantee distrained for the arrearages. And there it was adjudged, That the copyholder should hold the lands charged.

Copyhold lands not within the statute of 32. H. 8. *of* Conditions.

A copyholder by licence made a lease by indenture for 21 years rendering rent: The lessee covenanted to lay upon the lands yearly 40 loads of Dung. Afterwards the copyholder surrendered his lands unto another in fee, who was admitted. The point was, If he was such an assignee as might have covenant within the statute of 32 *H.* 8. *Quære*; for the case was not resolved. *M.* 20 *Jac. in C. B. Platt* and *Plomer's* Case, *Cro. Car. p.* 24.

A copyholder by licence of the lord made a lease for 60 years, if he so long lived, rendering rent, upon condition to re-enter: The copyholder surrendered to the lessor of the plaintiff in fee, who demanded the rent, which was not paid. It was resolved in this case, That the entry of the lessor was not lawful, for that copyhold lands were not within the statute of *conditions*, nor this lessor such an assignee as the statute intended: For the assignee of a copyholder being in only by custom, is not privy to the lease made by the first copyholder, nor in by him, but may plead his estate immediately under the lord. *Tr.* 10 *Jac. in B. R. Brasier* and *Beal's* Case, *Yelv.* 222.

Note, That in no case, where the king claims a share in the forfeiture of the lands,

* *For his advice.*

(as

(as in the ſtatute of 2 *H.* 5. which ſpeaks of lands forfeited for hereſy, *viz.* that the king ſhall have * *annum, diem, et vaſtum*, as he hath for lands forfeited for felony) copyhold lands are not within the general words of ſuch ſtatute: for that in ſuch caſe, if the copyholder committeth felony, the copyhold is preſently forfeited to the lord of the manor; and therefore out of the words of that ſtatute, and other the like ſtatutes.

The ſtatute of 12 *Eliz. cap.* 8. which ſpeaks of inquiſitions or offices found by eſcheators, doth not extend to copyhold lands: for although the ſame are not found within the inquiſitions or offices, yet the king ſhall not be entitled to any of the ſaid copyhold lands, but all ſuch copyholders ſhall and may hold and enjoy their eſtates and intereſts in their ſaid copyhold lands as formerly they might have done; and the intereſt of the copyhold is preſerved by the ſaid ſtatute, though it be not found by office after the death of the king's tenant.

Vid. 30 *Eliz. in Scaccario, Leon.* 1 part, 98. The ſtatute of 13 *Eliz. cap.* 4. of auditors and regiſters of the queen, doth not extend to copyholds, for that it ſhould be a great prejudice.

Then for the ſecond part of this diviſion.

Proofs.

Copyhold lands are within the ſtatute of 4 H. 7. *of* Fines.

Vid. 30 *Eliz. Leon.* 99. acc. If I levy a fine of my copyhold lands, and 5 years paſs; not only the lord is thereby barred as to the freehold of it and the inheritance,

* *Year, day, and waſte.*

but

but I who am the copyholder, am alſo barred as to my poſſeſſion: For the intent of the ſtatute was to take away all controverſies, * *et litibus finem imponere*; and contention may as well ariſe and be about copyhold lands as for freehold lands at the Common law. *Vide Coke* 5 part, *Saffyn's* Caſe, 123.

Copyhold lands are within the ſtatute of 29 Eliz. *and other ſtatutes of* Recuſancy.

A recuſant being convict for not paying of 20*l.* a month forfeited by the ſaid ſtatute, a commiſſion iſſued out of the *Exchequer* to enquire and ſeize all his goods, lands, tenements and hereditaments liable to ſuch ſeizure: Upon the return of the commiſſion it appeared, That ſome of the lands returned were copyhold lands. It was a queſtion if they were within the ſtatute. It was the opinion of the court, That they were within the equity of the ſtatute: for the words of the ſtatute are, *Lands*, *Tenements* and *Hereditaments*, which are forcible words: and the intention of the ſtatute was, That the queen ſhould have all the goods, and the recuſant by the words of the ſtatute was only to have the third part of his lands, which is all that the law gives him: And if copyhold lands ſhould not be within the ſtatute, if a recuſant, who had great poſſeſſions only of copyhold lands, ſhould go unpuniſhed, it was contrary to the meaning of the makers of the act. *Tr.* 30 *Eliz. in Scaccario, Suliard* and *Everat's* Caſe, *Leon.* 1 part, 97.

Copyholds are within the ſtatutes of 13 Eliz. *and* 1 Jacobi.

It was reſolved by all the juſtices, That copyhold is within the ſtatutes of 13 *Eliz.* and

* *And put an end to litigations.*

1 *Jacobi*,

Tr. 15 *Jac. in B. R. Criſp and Prat's Caſe, Cro. Car.* 550. *Hard.* 435, 436. *Gilb. Treat. Ten.* 294. See *Gen. Syſt. of Laws concerning Bankrupts*, p. 89 *to* 92.

1 *Jacobi*, becauſe it is no prejudice to the lord, for that there ought to be a compoſition with the lord and the vendee of the lands; and although the ſale is and ought to be by indenture, yet the vendee ought to be admitted by the lord. 2. The words of the ſtatute of 13 *Eliz.* expreſly are, That the commiſſioners ſhall diſpoſe of lands as well copy as fee; and the ſaid ſtatutes ſhall be conſtrued moſt beneficially for creditors, *i. e. ſuum cuique tribuere.*

There are divers other ſtatutes and acts of parliament which extend to copyhold land, *viz.* 1. The ſtatute of 5 *Eliz. cap.* 14. of *Forgery.* 2. The ſtatutes of 5 *R.* 2. *cap.* 2. of *Departure out of the realm*, and 14 *Eliz. cap.* 6. of *Fugitives.* 3. The ſtatute of 32 *H.* 8. *cap.* 9. of *Buying of pretenſed titles.* All which ſtatutes extend to copyhold lands; of which I might ſhew many caſes and reſolutions of the juſtices in their ſeveral courts. But becauſe the ſame would make this ſection to be long and tedious, and my intention was to uſe much brevity in this addition and amplification of what in the former part of this treatiſe hath been written concerning *Copyhold* and *Cuſtomary Eſtates*; I ſhall here put an end to the work.

Lord

Lord COKE's Reading on 27 *Ed.* 1. called the ſtatute of *Finibus levatis.*

FORASMUCH as fines levied in our court, ought, and do make an end of all matters, and therefore are called *Fines* principally, where after waging of battel, or the great aſſiſe, in their caſes ever they hold the laſt and final place. And now by a certain time paſſed, as well in the time of king *Henry* of famous memory our grandfather, as in our time, the parties of ſuch fines and their heirs, contrary to the laws of our realm of ancient time uſed, were admitted to annul and defeat ſuch fine, alledging, that before the fine levied, and at the levying thereof, and ſince, the demandants or plaintiffs, or their anceſtors were always ſeiſed of the lands contained in the fine, or of ſome parcel thereof; and ſo fines lawfully levied, were many times unjuſtly defeated, and annulled by the jurors of the country falſly and maliciouſly procured: We therefore intending to provide a remedy in the premiſſes, in our parliament at *Weſtminſter*, have ordained that ſuch exceptions, anſwers, or inquiſitions of the country ſhall from henceforth in no wiſe be admitted contrary to ſuch recogniſances or fines. And further we will that this ſtatute ſhall extend unto fines heretofore levied, as to them that ſhall be levied hereafter. And let the juſtices ſee, that ſuch notes and fines as hereafter ſhall be levied in our court, be read openly and ſolemnly, and that in the mean time all pleas ſhall ceaſe: And this muſt be at two certain days in the week according to the diſcretion of the juſtices.

The

The Firſt Reading on FINES.

The effect of a fine.

FORASMUCH as a *Fine*, being one of the higheſt matters of record, was firſt inſtituted for the quiet eſtabliſhing and ſure ſetting of mens inheritances; and therefore, as the preamble of the ſtatute ſaith, That it is called a fine, *becauſe a fine puts an end to diſputes*, which agreeth with the opinion of *Glanvil, lib.* 8. *cap.* 3. *p.* 63. one that wrote of the laws of *England* in the time of king *Henry* the ſecond, who ſaith thus, *Such an agreement is ſaid to be final, becauſe it puts ſo compleat an end to the buſineſs, that neither of the parties litigant can ever after recede from it.* And *Bracton* ſaith, *A fine is the extream of every thing, that is, whereby every thing is determined, and is therefore called a final agreement, becauſe it puts an end to diſputes.* For as the Common law hath preſcribed a ſure and ſafe way to acquire and get the property of goods, by ſale in market overt; ſo alſo the Common law hath ordained a ſure manner of conveyance for the purchaſer of lands, which, as our ſtatute ſaith, was by *Fine.* Therefore have I made eſpecial choice of this ſtatute treating of *Fines*, becauſe it is grown at this day to the moſt common aſſurance, and is almoſt the ſtrength of every man's inheritance. This ſtatute was made *anno* 27 *E.* 1. and the cauſe of making this ſtatute was, by reaſon of divers averments that were allowed in avoidance of fines, whereof we ſhall ſpeak more particularly hereafter, which averments as it appeareth by the letter of this law, were *againſt law, and againſt the*

Why called a fine.

A fine defined from its effect.

The reaſon for making the ſtatute of fines 27 E. 1.

ancient usage of our kingdom. Whereby it appears that fines have been of antient times; for they were ancient in king *Edward* the first his time. And master *Plowden* in his commentaries reporteth, That my lord *Catlyn* in his argument in *Stowell's* case cited many fines of antiquity; some touching the abbot of *Crowland* before the conquest: whereupon I gather that the Common laws of *England* at this day in ure, were not brought in and established by *William* the *Conqueror*, as many do affirm, and one hath lately committed to writing, but were long time, no man knows how long time before; for if fines were before the conquest, then were original writs also; for a fine cannot be levied without an original writ; except in especial cases, as shall be said hereafter. If by original writs, then in the *Chancery*; for all original writs since the beginning have issued out of the *Chancery:* And then have sheriffs also been before the conquest (although it be thrust into a chronicle, that the *Conqueror* brought in sheriffs) and that is as true, as he brought in justices of peace, who had their authority a good while after, *viz.* by act of parliament, *anno* 10 *E.* 3. But since original writs have been in use, they have been directed to the sheriffs as immediate officers; but original writs were before the conquest, therefore the conqueror directed not first, that there should be sheriffs in every shire. This doth notably appear by a book-case in 26 *Libr. Ass. p.* 24. that in the 26 *E.* 3. in an assise arraigned before justice *Thorp* and others, the abbot of *Bury* came into the court, and claimed to have conusance of all manner of pleas, and to have original

The antiquity of fines.

Justices of the peace, and their origin, was by stat. 1 Edw. 3. c. 16.

ginal writs out of the king's court; and this the abbot claimed by uſage and preſcription in the time of king *Edmund* and king *Edward* the *Confeſſor*. By which book-caſe it appeareth, that in the time of king *Edmund* and king *Edward* the *Confeſſor*, there were original writs, and had been then time out of mind. For the abbot's predeceſſors had uſed to have the ſame franchiſe in thoſe kings times by preſcription and uſage, and every preſcription is time out of mind. To ſay, becauſe certain inſtitutions and grounds of the laws of *England* are writ in the *Norman* tongue; and a certain book there is, called *The cuſtoms of Normandy*, that hath much affinity with the laws of *England*, that therefore it is likely, that the *Conqueror* brought in the Common law; ſurely the argument is too weak to perſuade any, as I think. For if the *Normans* have any laws that do reſemble the laws of *England*, out of doubt, when the *Conqueror* had ſubdued this kingdom, perceiving the equity and excellency of the laws of *England*, never attempted to alter or change the ſame; but to the end that his own country-men, the *Normans*, might know the laws of *England*, under which from thenceforth he reſolved they ſhould live. And therefore for their benefit and ſafety, he cauſed ſome of the laws and ordinances of *England* to be written in the *Norman* tongue. And afterwards ſeeing and well perceiving the happy ſucceſs, where ſuch laws were obſerved, aboliſhed his old laws out of *Normandy*, and eſtabliſhed part of our *Engliſh* laws there. And it cannot be truly ſaid, that the *Engliſh* laws are in the *Norman* tongue; for the laws of *England* are *unwritten laws*,

laws, but divinely caſt into the hearts of men, and built upon the irremovable rock of reaſon. And herewithal agreeth *Bracton*, *lib.* 1. *cap.* 1. *P.* 1. *N°.* 1. for he ſaith, *But whereas written laws are uſed in almoſt all countries*, England *alone makes uſe of, within its realm, an unwritten law, and cuſtom.* And old *Glanvil*, that wrote in *Henry* the ſecond his time, which was not long after the conqueſt, is of the ſame opinion; for he ſaith in his prologue to his book, *Though the laws of* England *are not written, it is not abſurd to call them laws.* And ſoon after he ſaith, *For if they ſhould be eſteemed leſs laws, becauſe they are not reduced into writing, then writing certainly ſeems to add greater authority to them, than diſcerning equity, or legiſlative reaſon; the laws of the kingdom are generally reduced to writing.* And albeit, that certain opinions and judgments are reported in the *Norman* tongue, yet thoſe are not aptly termed the laws of *England*. But it is objected out of *Polidore Virgil*, [ſee *Hick. Diſſert. epiſtol. p.* 152, 153.] that juries and trials by twelve men were firſt invented in the *Conqueror*'s time; which undoubtedly is apparently falſe; and thus I prove it. The book of *Dooms-day* was made in Saint *Edward* the *Confeſſor*'s time, and all the manors that were in the hands of king *Edward* were *ancient demeſnes*, and all his tenants had thoſe privileges, that our tenants in *ancient demeſne* have at this day. And the reaſon why king *Edward*'s tenants had thoſe privileges, as tenants in *ancient demeſne* have at this day, was, becauſe his tenants ſhould be the better able to manure and huſband their grounds, both for his own proviſion, and for the ſuſtenance of

A definition of the laws of England.

The beginning of juries.

Tenants in ancient demeſne, *and their privileges.*

his garriſon, which he then held; and therefore his tenants were diſcharged of being contributary to the fees of the knights of the parliament. They were alſo diſcharged from being of juries, and alſo had other privileges and uſes, which are continued until this day. Whereby it is apparent, that there were juries and inqueſts before the conqueſt. And where the laws of *England* are termed by a ſaid new author to be unequal laws, evil laws, uneaſy laws to be kept, grounded upon abſurdities, and divers other irreverent and opprobrious ſpeeches; yet I will not ſpeak one word in the commendation of them, nor yet ſtand to anſwer that frivolous accuſation; for neither doth the accuſer deſerve an anſwer, nor yet the thing accuſed deſire a defender: For the accuſation is apparently falſe, and the thing accuſed of moſt ſingular excellency. But to return again, from whence by digreſſion I am fallen. And at this day, becauſe it is a true ſaying, *That we know any thing, when we know the parts of it, and have conned and ſeen them through and through*, I will ſhew unto you the parts, and particular members of a *fine*, and proſecute the parts with your patience hereafter.

See 2 E. 4. 4, 5. Firſt, it is neceſſary, in order to levy a fine, to have an *original writ*, to make the parties come into court, and proceed farther.

Secondly, When the parties are come into court upon the original writ, and it is agreed between them, to levy a fine, that concord and peace ſhall enſue. They agree in this form.

Concord of a fine. *And the agreement is ſuch*, viz. *That the aforeſaid R. viz.* the tenant in the original writ *hath*

both acknowledged the manors aforesaid, or the tenements comprized in the writ *To be the right of him the said* H. *as those which he has of the gift of the aforesaid* R. *and those he has remised and quit claimed from him and his heirs to the aforesaid* H. *and his heirs for ever.*

This is called the *concord* of the fine, which in truth is the foundation, ground, life, and heart of the fine; and the other parts following but abstracts out of it; for if the king's silver be entered, though the parties, or any of them dies before the other parts are entered of record, yet the fine is good and will bind. 5 Co. Teye's case.

The third part of the fine is called the foot of the fine, and that is in this form.

This is the final agreement, made in the court of the lord the king at Westminster, *from the day of* Easter *in* 15 *days, in the year of the reign,* &c. *before Sir* J. D. *knight,* R. M. T. W. *and* E. D. *and others trusty then there present, between* R. B. *plaintiff, and* R. S. *deforceant*; and recite in effect the concord. *Foot of a fine.*

Add the year, day, and place, and before what justices the concord was made, the which circumstances are put in the record.

The fourth part of the fine, is called the *note* of the fine, which has this form.

Between R. B. *plaintiff, and* R. S. *deforceant, of the manor of* D. *&c. whereof a plea of covenant was had* between them *in the same court, viz. that the aforesaid* D. *acknowledged the manor, &c.* *Note of a fine.*

Recite the *concord* of the fine, by which it appears that the *note* of the fine is but an abstract out of the original writ, and the concord.

If in *quid juris clamat*, the tenant claims fee, it shall be a good plea to say, that he was seised the day of the note levied for term of life; and yet as well the note of the fine, as the foot of the fine, may be entered three or four years after the record made. And also (as it seems to me) the reversion passes to the *conusee* immediately after the record made, and entered of record. *Quære*, If the tenant is not compellable to take traverse, as to say what day of the note, he was seized in fee; *absque hoc*, that he was tenant for life.

And so agrees 14 E. 4. 6. *and* 15 E. 4. 28. *but* 1 H. 7. 27. *says, that the plaintiff may claim fee only without travers, and then it comes on the part of the plaintiff to maintain his writ, saying, that the tenant was tenant for life, without this, that he was seized in fee; but it seems better, that the travers should come of the part of the tenant, and not on the part of the plaintiff.*

Lastly; A fine is engrossed, and is said to be engrossed, when the chirographer has made the indentures of the fine, and delivered them to the parties, to whom the commission was made.

12 H. 4. 16. *to a note of a fine not pleadable before the fine engrossed, but after engrosment of the fine, as it seems.* Contra *by this book.* Bro. Abr. Tit. *Fines* 41. Rast. *Execution* 3. *f.* 158.

Note; Yet a fine, before it be engrossed, is a perfect record, and may be executed, and the conusee ought to sue out his *quid juris clamat*, *per quæ servitia*, or *quem redditum reddit*, as his case lies, before the engrosment of the fine: for the fine engrossed, the conusee hath not any mean to compel the tenant to attorn; and then the conusee may by this way lose his service, and all actions, which the law after attornment gives him.

Some fines are to be executed by *entry* only; some by *scire facias*, or *entry*, as long as the entry

entry of the conuſee is lawful. But at Common law our books ſay, that the conuſee has no remedy, if the fine be not executed, but writ of *fine facto:* Which (as it ſeems to me) is to be intended, when the entry of the conuſee was taken away. For by the order of the Common law, the conuſee might have entry. But the *ſcire facias* is given by the ſtatute of *Weſtm.* 2. *Whereas of thoſe things which are recorded, &c.* 21 E. 4. 4. b. 45 E. 3.

Scire facias *is a writ judicial moſt commonly to call a man to ſhew to the court, whence the iſſues, or the execution of judgment ſhould not go out.* Old Nat. Br. 151.

The Second Reading.

EVERY fine either is *executed*, or *executory*.

The general diviſion of a fine.

A fine is ſaid to be executed, not becauſe the conuſee is immediately in poſſeſſion; but becauſe the fine is executed between the parties, ſo that the conuſee cannot ſue out execution, becauſe the fine in itſelf is ſuppoſed to be executed.

Deſcription of a fine executed.

A fine is ſaid to be executory, becauſe the fine does not ſuppoſe any execution; but the conuſee may execute it, or by entry, or by *ſcire facias*.

Deſcription of a fine executory.

Three ſorts of fines executed.

Diviſion of a fine executed.

Fine *ſur conuſans de droit, come ceo que il ad de ſon done*, (upon acknowledgment of right as that which he hath of his gift.)

Fine upon releaſe.

Fine upon ſurrender.

There are two ſorts of fines executory.

Diviſion of a fine executory.

Fine *ſur conuſans de droit tantum*, (upon acknowledgment of right only.)

Fine upon grant and render.

So that there are five ſorts of fines; a fine *ſur conuſans de droit, come ceo que il ad de ſon done*, and is in this manner and form.

The form of a fine ſur conuſans de droit come ceo que il ad de ſon done.

And the agreement is ſuch, that the aforeſaid B. *and* I. *have acknowledged the aforeſaid manor with the apurtenances, to be his right, &c. as thoſe which the ſame* B. *and* S. *have of the gift of the aforeſaid* B. *and* I. *and thoſe they have remiſed and quit claimed from them the ſaid* B. *and* I. *and from the heirs of the ſame* I. *to the aforeſaid* P. *and* S. *and the heirs of the ſame* P. *for ever. And moreover the ſaid* B. *and* I. *have granted for themſelves, and for the heirs of the ſame* B. *that they will warrant the aforeſaid manor to the aforeſaid* P. *and* S. *and to the heirs of the ſame* P. *for ever.*

11 H. 4. 55. B. 8 E. 4. 8. B. *by* Littleton, *it appears, that the conuſee is tenant. Contrary of a fine upon grant and render; for this is executory, and upon this it may be reverſed.* 41 E. 3. 13. B. Gift ſur conuſans de droit, *and* Habendum *in tail is executed by the court. Contrary of a remainder, or a reverſion.*

This fine is executed, becauſe it ſuppoſes a gift precedent, but though it be executed between the parties, yet as to all ſtrangers the conuſor remains ſeized of the land: but if ſuch fine be levied of a rent, common, advowſon, liberties, or ſuch like, the conuſee has a freehold in law in him, before any poſſeſſion or actual ſeiſin had.

The iſſue in tail cannot have continuance of poſſeſſion againſt fine ſur conuſans de droit *&c. becauſe that is by the ſtatute of* 27 E. 1. cap. 24. de finibus *at the common law, which was after the ſtat. of* W. 2. de donis conditionalibus, *made* 13 E. 3. *Contrary of a fine* ſur conuſans de droit tantum, *for ſo it was at Common law.* 12 E. 4. 15, 19.

If a man ſeiſed in fee levies a fine to anſwer *ſur conuſans de droit come ceo que il ad de ſon done*, and before entry made by the conuſee, a ſtranger enters, and dies ſeized; neither the conuſee, or conuſor has any remedy. 41 *E.* 1. 14b. *Finch.* [This ſhould be 41 *E.* 3. 14. according to *Bro.* Fines, *pl.* 12. 13 *Vin. Abr.* 249. (P. 4)

pl. 1.] But if after the fine levied, the conuſor continues poſſeſſion, and dies in poſſeſſion, the conuſee may not enter upon the heir; and if he enters after the deſcent, he ſhall avoid the ward. 12 *H.* 4. 16. *Thirning.*

But if ſuch fine (as it ſeems to me) be levied of a reverſion expectant upon the eſtate for life, or in tail; after the death of the leſſee, or the eſtate-tail determined, the conuſee ſhall have *ſcire facias*; and therefore if the leſſee be diſſeiſed, and a deſcent, and afterwards the leſſee dies, the conuſee is not without remedy, as it ſeems to me.

If a man levies a fine *ſur conuſans de droit come ceo que il ad de ſon done*, and does not limit it to the conuſee and to his heirs, yet the conuſee has fee-ſimple. 42 *E.* 3. 5. *B.*

But if ſuch a man levies ſuch a fine, with expreſs limitation to the conuſee and his heirs of his body, this limitation is a qualification of the general intendment. 41 *E.* 3. 14. *A.*

Fine *ſur conuſans de droit &c.* levied to two and to the heirs of the one, the joint-tenant for life ſurvives, and dies, the heir of the other who had inheritance ſhall not have *ſcire facias* to execute the fee; for it was executed before. *Per Hill* and *Thirning.* 11 *H.* 4. 5. *B.*

But if fine be levied *ſur conuſans de droit come ceo, &c.* to one for life, the remainder in tail, the remainder in fee to the tenant for life, there, he in the remainder in tail, after the death of the tenant for life, ſhall have *ſcire facias*, to execute the eſtate-tail, and the ſon alſo of the tenant for life, after the death of the tenant in tail; but (as it ſeems to me) if tenant in tail in remainder dies before tenant for life, 38 *E.* 3. 21. 42 *E.* 3. 14.

then is the fine executed in the tenant for life, and he ſeized in fee: as if land be given for life, the remainder in tail, the remainder to the right heirs of the tenant for life, tenant in tail dies, the tenant for life is ſeized in fee. 40 *E.* 3. 9. 33 *H.* 6. 5.

The Third Reading.

The nature and form of the fine upon ſurrender.

FINE upon Surrender is an expreſs fine upon Surrender; or fine which amounts to a Surrender.

A fine upon expreſs ſurrender is, when the leſſee for life, or for another's life, or tenant in tail after poſſibility, tenant in dower, or by the curteſy, by fine ſurrender their eſtates to him in reverſion, and the form of the fine is ſuch in effect, as the fine *ſur conuſans de droit*; ſaving that theſe words *ſurrendered* are in the fine upon ſurrender, and the clauſe of the warranty omitted.

A fine upon ſurrender ſhall be without warranty.

A man made a leaſe for life, and afterwards granted the reverſion for life, the remainder in tail by fine, the grantee for life brought *quid juris clamat* againſt the tenant for life, who would have ſurrendered by fine to the grantee with reſervation of the rent, during the life of him who ſurrendered, and this fine was rejected; and the reaſon of the refuſal, as I take it, was becauſe the eſtate of him who ſurrendered, was extinct and merged in the eſtate of him in the remainder for life; and then if he in the remainder dies, during the life of him who ſurrendered, and he in the remainder in tail enters, he ſhall hold it diſcharged; and note, that it is againſt the nature and credit of a fine to omit

A fine comprehends certainty.

omit any thing; either in which certainty is not repoſed, or in which the thing cannot take effect and continuance according to the purport of the fine. 19 *E.* 3. [*quære, for there is no ſuch year.* 13 *Vin. Abr.* 243. *pl.* 1.]

And therefore in our books, a grant and render was drawn by fine for another's life, the remainder over in fee; and there *Charde* ſaid, that the fine ought to be certain, and to limit in what perſons the land ſhould abide; and becauſe it was uncertain who ſhould have the land, if the tenants for life died living *ceſtuy que vie:* Upon this *Thorpe* drew the fine to the leſſees and the heirs of the one for the other's life, with the remainder over, and then was reſtrained with great difficulty, as the book ſays, *propter opinionem Stone*; and the reaſon of the doubt which *Stone* had, as I take it, was becauſe ſome ſay, the limitation to the one and to his heirs during the life of *J. S.* was void; and notwithſtanding this, there ſhall be an occupant, becauſe the fee-ſimple cannot depend upon the life of a man; but I hold the law againſt this; and ſo is *Littleton* 168. 19 *E. Accompt* 56. 33 *Aſſ. pag.* 17. 22 *Aſſ. pag.* 31. and 11 *H.* 4. 43. But I agree, that this ſhall not be ſaid in fee-ſimple, but that the heir ſhall take it, as an eſpecial occupant named in the deed. The law is the ſame, if a fine be drawn, that *J. S.* acknowledged the land to be the right of *J. D.* and *J. G.* and to their heirs, ſuch a fine the juſtices ought not to receive; becauſe the fee-ſimple ſhall not be certainly repoſed in any certain perſon; for it may be that *J. D.* ſhall ſurvive, and then he ſhall have the fee; or it may be that *J. G.* ſhall ſurvive,

vive, and then he ſhall have the fee; the which (as I have ſaid) would be againſt the nature and credit of a fine; againſt the nature, becauſe a fine in it's nature is a final agreement, and rejects certainly all uncertainty; for certainty (as is ſaid) begets quiet, and uncertainty, contention; againſt the credit of a fine, becauſe that credit always attends and accompanies with certainty; and of the contrary part, uncertainty and falſity begets trouble and diſcredit. 2 *H.* 5. 33 *H.* 6. 45 *E.* 3. 18 *H.* 7. 24 *E.* 3. 36. 21 *E.* 3.

Three men may levy a fine with warranty, for them and the heirs of them all of land in Gavelkind. *Contrary of other lands.*

It is ſaid alſo in another book, that two men ought to warrant by fine lands for them and their heirs to another, for the reaſon which I have ſaid before; but for them and the heirs of one of them otherwiſe. 21 *E.* 3. 27 *B.* *Br. Ab. Tit.* Fines, 44. 24 E. 3. 66. Bro. Abr. Tit. *Fines*, 65.

A fine levied for life rendering rent, with a clauſe of diſtreſs, ſhall be received. Contrary with re-entry for nonpayment. 44 E. 3.

Alſo the juſtices will not receive a fine upon condition for the reaſon before; but in all thoſe caſes, if the juſtices receive ſuch a fine, this is good enough and ſhall bind, as *Brook* ſaith, in Tit. *Fines*, 5. For fines are, as he ſays, as if the parties agree, and ſo are the books. 8 *E.* 2. *Fines*, 125. and 3 *E.* 3. 17. *And every one conſenting cures an error.* 44 E. 3. 22. 27 H. 8. 24. 37 H. 6.

But it ſeems to me in the caſe aforeſaid, if the reverſion of a leſſee for life be granted for life, that the tenant for life may grant land by fine to the grantee for life, the grantee yielding rent; becauſe it is not any abſolute ſurrender, for if the grantee dies, the tenant for life ſhall have the land behind again, as our books

books are. 7 *H.* 6. 13 *R.* 2. 29 *Aſſ. Brook. Tit.* Eſtates 69.

Leſſee for life, the remainder for life; leſſee for life levies a fine to him in remainder for life, *ſur conuſans de droit*, this in truth enures by way of ſurrender, 3 *Aſſ.* But if there be a leſſee for life, the remainder for life, and he in the remainder for life accepts a fine of the tenant for life, *ſur conuſans de droit come ceo*, &c. this is a forfeiture of both their eſtates, and ſhall not enure by way of ſurrender; but he in the reverſion may enter immediately for the forfeiture. 1 *H.* 7. *A forfeiture by acceptance of a fine. Forfeiture. Surrender.*

If a leaſe be made for life, the remainder to the wife in fee, and tenant for life levies a fine *ſur conuſans de droit*, to the huſband and wife, and to the heirs of the huſband; in this caſe, if the wife dies without an heir, the lord ſhall have the land by eſcheat; for this amounts to a ſurrender in law. 30 *E.* 3. 30 *Aſſ. Oſborn's* caſe.

But if a leaſe be made for life, the remainder in tail to *B.* the remainder in fee to *C.* tenant for life levies a fine to *A.* and his wife in fee, *A.* dies without iſſue, *C.* enters for the forfeiture, this is no ſurrender. 41 *E.* 3. 41 *Aſſ.*

If leſſee for life, and he in the remainder for life levy a fine *ſur conuſans de droit*, to a ſtranger, he in the reverſion may enter immediately for the forfeiture.

Two joint-tenants, the one for life, the other in fee, make a leaſe to *J. S.* for term of his life, and afterwards *J. S.* ſurrenders by fine to him who was joint-tenant for life; it ſeems to me, that this is a ſurrender, and ſhall enure to both, as it ſeems to me; yet *quære.*

But

But in the ſame caſe, if *J. S.* had granted his eſtate by fine to him who was joint-tenant for life, it would be a ſurrender in law for a moiety, and a grant of his eſtate, for the other moiety; and the joint-tenant in fee could not enter into any part with him, as it ſeems to me.

The Fourth Reading.

If a diſſeiſor leaſes for years, and the diſſeiſee releaſes all his right to him, this does not avail; for it is but a chattel, and wants privity. 49 E. 3. 28. *a releaſe which enures to veſt the eſtate, is never good without privity. See* 4 E. 3. 17.

TENANT in tail makes a leaſe for his own life, and he in the reverſion releaſes to the leſſee for life by fine, and to his heirs, it ſeems to me, that this releaſe is altogether void; for though Mr. *Littleton* ſays, that in every caſe, where he, to whom the releaſe is made, has freehold in deed, or in law, that ſuch releaſe is good, this is true, but not in all caſes; and therefore I have taken a *diverſity, viz* in all caſes, when a releaſe ſhall enure by way of veſting the eſtate, it is not ſufficient for him, to whom the releaſe is made, to have freehold only, but there ought to be privity between the releaſor and releaſee; but when a releaſe ſhall enure by way of paſſing a right therein to him without privity, (as if the diſſeiſor makes a leaſe for life, and afterwards the diſſeiſee releaſes to the tenant for life,) this is good: but if tenant in tail makes a leaſe for another life, the releaſe of the donor is good to ſuch leſſee.

A man leaſes by indenture in July, to have the land from the feaſt of St. Michael next for 21 years, the leſſor releaſes to the leſſee before Michaelmas all his right; this releaſe is void, for he has not poſſeſſion before Michaelmas. 28 E. 4. 37.

A man makes a leaſe for years, and before the leſſee enters, the leſſor by fine releaſes to him and to his heirs, now this is a void releaſe; for the leſſor againſt his own fine might

ſay,

ſay, that the leſſee had not entered into the land, before the fine levied; and yet 31 *Aſſ.* 24. is adjudged againſt ſuch a caſe, but other books are to the contrary, and ſo is the law. 16 *H.* 7. 5. 50 *E.* 3. 37. 3 *H.* 6. 23. 46 *E.* 3. 13. 15 *H.* 7. 14. 47 *E.* 3. 27, *&c.*

But if a man makes a leaſe for years, the remainder for years, the leſſor releaſes to him in remainder for years in fee, this is a good releaſe; and yet he in the remainder had not any poſſeſſion; the law is the ſame, if a man makes a leaſe for 100 years, and the leſſee for 100 years, makes a leaſe for 50 years, and afterwards the firſt leſſor releaſes to the firſt leſſee in fee, this releaſe is good; and yet the leſſee to whom the releaſe is made, has not any actual poſſeſſion. 12 *E.* 4. 6. But in the ſame caſe, a releaſe made to the ſecond leſſee is void; for though he had poſſeſſion, yet he wanted privity; and yet a leaſe made by the leſſor by fine made to the tenant in ſtatute ſtaple, or merchant, or by *elegit* is good, and yet he wanted privity. 25 *E.* 3.

Leaſe for life, remainder for life, the leſſor releaſes in fee to him in remainder, this is a good releaſe; but Finch *ſaid he ſhould not have an action of waſte upon the attornment of tenant for life; contrary* Percey. 48 *E.* 3. 16. *A man leaſes for life, and grants the reverſion to two, the tenant attorns, the one of the grantees releaſes to the other, this is good; ſo if a ſtranger releaſes to him in revertion.* 5 E. 4. 1. *If the lord releaſes to the diſſeiſee after diſcontinuance, or to the iſſue in tail after diſcontinuance, to hold by fewer ſervices, or releaſes all rents and ſervices, this is good; though they had not the poſſeſſion; but tenants as to the avowry contrary, as to the paſſing of the fee.* 14 H. 4. 37, 38.

In *præcipe quod reddat*, the tenant vouches, the vouchee enters into the warranty, if the demandant releaſes to the vouchee by fine, or 20 H. 6. 29. *The demandant may releaſe to the vouchee, but not a ſtranger; for though he is tenant in law, yet he has nothing in the land, whereon a right will enure.* 3 H. 4. 5. a. *and beſides which, the releaſe fortifies the tenant's eſtate,* 5 H. 7. 41. a. *and that he may render the action or levy a fine; and that he pleaded a releaſe made to the tenant after he had entered into the warranty.*

by

by deed, this is good; yet the demandant nor the vouchee had nothing in the land, 7 *E.* 4. 13. 10 *E.* 4. 15. *a.* 22 *H.* 6. 15. *a.* 8 *H.* 4. 3. the vouchee ſhall have a writ of error. So a releaſe to the patron of all annuities is good, and yet cannot be charged with this by no way. 2 *E.* 3. 28. 21 *H.* 7. 41. 8 *H.* 6. 24.

Maxim, where a releaſe ſhall enure by way of entry and feoffment.

In all caſes when a man is in ſuch eſtate to which a warranty may be annexed, at the time of creation of the eſtate, if the releaſe be made to ſuch eſtate, ſuch releaſe ſhall not enure by way of entry and feoffment; for this is the reaſon of the diverſity put by *Littleton*, (*ſcilicet*) when the diſſeiſor enfeoffs two, if the diſſeiſee releaſes to the one of them, he ſhall not hold his companion out; the reaſon is, for the poſſibility of the warranty; for if this ſhall enure by way of entry and feoffment, it will deſtroy the warranty, which was much favoured in ancient books. 21 *H.* 6. 41. 22 *H.* 6. 22. And for this, the ancient law was, that if a diſſeiſor had made a feoffment in fee with warranty, or had made a gift in frank marriage which implies warranty, the diſſeiſee could not have entered upon him for ſecuring the warranty, as is held in 1 *Aſſ.* 13. 27 *Aſſ.* 31. 29 *Aſſ.* 54. and an ancient book in 29 *H.* 7. *Bro. Tit.* Aſſiſe 432.

But in all caſes where two are in merely by wrong, without any title, there (as *Littleton* ſays) a releaſe made to the one ſhall enure ſolely to him, and he ſhall hold his companion out. And therefore, if leſſee for years makes a feoffment in fee to two, and afterwards the leſſor releaſes to the one of them, he to whom the releaſe is made, ſhall not hold his companion out,

out, and yet, they are diſſeiſors: but if a man makes a leaſe for life, and afterwards the leſſor makes charter of feoffment to two, and a letter of attorney to the one to make livery, who does it accordingly; and afterwards the leſſee releaſes to the one of them, he to whom the releaſe is made, ſhall hold his companion out; for this puts the right ſolely in him, to whom the releaſe was made.

There are two diſſeiſors, and the diſſeiſee releaſes to one of them upon condition, now he to whom the releaſe is made, ſhall hold his companion out; but if afterwards the condition be broke, they are joint-tenants again. 17 *Aſſ.*

If my tenant pays my rent to two, and I releaſe to the one of them, this releaſe ſhall veſt the whole rent in him, to whom the releaſe is made. 18 *Aſſ.* But if my tenant delivers a pawn to the ſtranger for the rent, in name of attornment, the releaſe to the ſtranger is altogether void.

The Fifth Reading.

IF there be lord and tenant, and the lord releaſes all the right he has in the land, or all the right he has in the ſeignory, to the tenant, by deed, or by fine, the ſeignory will be for ever extinct, without theſe words, *his heirs*. *Littleton* 112. 26 *H.* 8. 42 *E.* 3. 13 *E.* 3. 18 *E.* 3. 11 *H.* 4. *Bro. Abr. Tit.* Rel. 86.

But if the lord in the ſame caſe releaſes by deed, or by fine, to the tenant, for term of his life, or in tail, this ſhall not extinguiſh the whole ſeignory; becauſe the lord departs with an

an inheritance in poſſeſſion. But if the diſſeiſee releaſes to the diſſeiſor for life, or in tail, this ſhall put the right in the diſſeiſor for ever, becauſe a naked right paſſes from the diſſeiſee, and not any thing in poſſeſſion. 6 *E.* 3. 45 *E.* 3. But if the diſſeiſee releaſes to the diſſeiſor by deed indented, or by fine for life, or in tail, after the eſtate for life ended, or gift in tail determined, the diſſeiſee may enter again, tho' but one right paſſes by the releaſe.

Joint-tenant releaſes to his companion, and a parcener to a parcener.

If there be two joint-tenants in fee, and one releaſes to the other all his right, and does not ſay, *to have and to hold to him and to his heirs*, yet this releaſe gives a fee-ſimple, 19 *H.* 6. but if there be two coparceners, and the one releaſes to the other, all his right, an eſtate in fee-ſimple does not paſs by ſuch releaſe.

If huſband and wife, and a third perſon are joint-tenants in fee, and the third perſon releaſes to the huſband all his right, without ſaying, *to have and to hold to him and to his heirs*; yet the huſband has a fee-ſimple, and the wife ſhall take nothing by this releaſe, as it has been adjudged; and yet it ſhall enure to paſs the eſtate. *Eſcot*'s caſe.

Two tenants in common make an agreement to preſent by turns to an advowſon, and afterwards the one releaſes to the other; the releaſe is good. 39 *E.* 3. 37. *Bro. Abr. Tit.* Releaſes 77.

If there be two tenants in common, and the one of them releaſes to the other in fee, and makes livery and ſeiſin, *according to the form of the charter*, the livery is void, and alſo the releaſe. 10 *E.* 4.

If

If there be lord and tenant, and the tenant is diſſeiſed, the diſſeiſee purchaſes the ſeignory, and releaſes by deed, or fine, all his right in the land ſaving to him his ſeignory; the ſeignory by ſuch releaſe is not extinct; but if in the ſame caſe the lord has nothing in or out of the land except only the ſeignory, and makes ſuch releaſe ſaving his ſeignory, ſuch ſaving is void; becauſe the whole operation ſhall be reſtrained by the ſaving. 9 *E.* 3. 12 *E.* 4. *College Lingfield*'s caſe.

If there be lord and tenant, and the tenant holds three acres at three ſhillings, the lord releaſes all his right in one of the acres, the whole ſeignory is extinct; and yet if he grants all the ſervices iſſuing out of one of the acres, nothing ſhall paſs. 20 *H.* 6. 34. *Aſſ. p.* 15. 7 *E.* 4. *Lord releaſes all his right in part of the tenancy, and his ſervices of part.*

If there be two joint-tenants or tenants in common, and they are diſſeiſed, and afterwards the one of them releaſes all the right which he has in the moiety, he ſhall be barred of his right of the whole; and yet each joint-tenant is ſeiſed abſolutely, 45 *E.* 3. but if there be two joint-tenants of two acres, and they are diſſeiſed, and the one releaſes all his right which he has in the one acre, this ſhall bar him but of the moiety of that acre only, and yet the moiety of two acres is one acre. 45 *E.* 3.

If a grantee of a rent-charge of 20 *s.* releaſes 10 *s.* to the tertenant, this is good enough, and the entire rent ſhall not be extinct; but by the law of common of paſture, common of eſtovers, and all things againſt common right, the grantee may releaſe parcel of them to the tertenant; if the grantee purchaſes parcel of the land, all ſuch things againſt common right are extinct;

becauſe in an aſſiſe for them, all the tertenants ought to be named: and inaſmuch as the grantee has parcel of the land by his own act, all the rent ſhall be extinct. So if a man has a rent-charge out of twenty acres, if he releaſes all his right in one acre, it extinguiſhes the grant in all. 34 *Aſſ. p.* 15.

If a man leaſes for life rendering rent, the leſſor may releaſe part of the rent, and the reſt remains. 9 *E.* 3. *Bro. Abr. Tit. Releaſes*, 83. The lord may releaſe part of the ſervices and the reſt remain. 14 *H.* 4. 7.

The Sixth Reading.

THE form of a fine *ſur conuſans de droit tantum* (*upon acknowledgment of right only.*)

Form of a fine ſur conuſans de droit (*upon acknowledgment of right.*)

And the agreement is ſuch, that the aforeſaid A. B. *hath acknowledged the manor aforeſaid with the appurtenances to be the right of* W. P. *and has remitted and quit claimed them from* A. B. *and his heirs to the aforeſaid* W. P. *and his heirs for ever. And moreover the ſame* A. B. *hath granted for him and his heirs, that he will warrant the aforeſaid manor with the appurtenances to the aforeſaid* W. P. *and his heirs againſt all men for ever, &c.*

Fine ſur conuſans de droit tantum, (*upon acknowledgment of right only,*) *gives a fee without the word heirs,*

This fine *ſur conuſans de droit* (*upon acknowledgment of right*) is executory, and the party conuſee may have a *ſcire facias* to execute it, but a fine *ſur conuſans de droit come ceo quil ad de ſon done* (*upon acknowledgment of right as that which he has of his gift*) is executed, whereof the conuſee ſhall never have any *ſcire facias*; but yet each of the fines gives a fee-ſimple to the conuſee without theſe words, *his heirs*; for

each fine *ſur conuſans de droit* (*upon acknowledgment of right*) is intended fee-ſimple.

The form of a fine ſur Grant and Render.

And the agreement is ſuch, (*all as above*, *ſaving* that theſe words are added, *come ceo que le dit* W. P. *ad de ſon done*; (*as that which the ſaid* W. P. *has of his gift*) and after the ſaid clauſe of warranty, then the Grant and Render is in this form; *And the ſame* W. P. *has granted the aforeſaid manor with the appurtenances to the aforeſaid* A. B. *for this acknowledgment, quit claim, warranty, fine and agreement, to have and to hold during all the life of* A. B. *or of the heirs of* A. B. *of the body of* A. B. *or to his heirs for ever rendering, &c.* *Form of a fine upon grant and render.*

This fine is executory alſo, as appears plainly by our books; and it is to be known that this fine upon grant and render cannot be levied upon a fine executory: and therefore if a man levies a fine *ſur conuſans de droit tantum* (*upon conuſance of right only*) to *J. S.* he cannot grant and render the lands again to the conuſor, becauſe the conuſee has nothing in the lands till execution ſued out, and a man cannot grant what he has not. *Grant and render cannot be upon a fine executory*, 2 *H.* 5. 2.

In *Hil.* term 7 *E.* 3. *fol.* 14. one would have drawn a fine *ſur conuſans de droit tantum*, and that the conuſee ſhould grant and render a robe annually for life to the conuſor, with a clauſe of diſtreſs; but ſuch render was not received becauſe the conuſee could not charge what he had not; but upon a fine executed, as a fine *ſur conuſans de droit come ceo qué il ad de ſon done*, or a fine upon a releaſe, or a fine upon a ſurrender, grant and render may be made, for theſe fines are immediately executed, and *Quære, whether one may render on a fine, on a releaſe which enures not by way of extinguiſhment; for the conuzee took nothing.*

therefore the conuſee may well grant and render. 24 *E.* 3. *fol.* 36.

It appears by our books, that if huſband and wife levy a fine to *J. S.* the grant and render may be to the huſband and to his heirs for ever. 24 *E.* 3. 61, 66.

So if huſband and wife acknowledge by fine, the conuſee may grant and render parcel to the huſband only, and the other parcel to him and to his wife. 17 *E.* 3. 31. 12 *E.* 3. 33. *Tit. Fines.* 61.

So if covenant be brought by two, the defendant may acknowledge one moiety * to the other; or one part inſeveralty to one, and the other part in ſeveralty to the other; but it ſeems by 7 *E.* 3. 25. That if three bring *a writ of covenant*, the fine ſhall not be levied to two only, but *in a writ of covenant* by two, the defendant may levy a fine to one, the remainder to the other, or levy a fine to one rendering rent, and by the ſame fine, grant the reverſion to the other. † 16 *E.* 3. *Bro. Abr. Tit.* Fine, ‡ 5, 7. 36 *H.* 8.

Maxim. No one ſhall take immediately by the grant and render, but thoſe, or ſome of thoſe who were parties to the acknowledgment, and no other, no more than a fine can be levied to one immediately who is not party to the *writ of covenant*, as the book is in 7 *E.* 3. 64.

It is expreſsly ſaid in 30 *H.* 8. *Bro. Abr. Tit. Fines*, 108. That no one ſhall take the firſt eſtate by the fine, but thoſe who are parties to the

* *To the one, and the other moiety*, 13 Vin. Abr. 245. *pl.* 16.

† *Quære, for there is no ſuch year*, 13 Vin. Abr. 246. pl. 18.

‡ *This ſeems a miſtake, and that it ſhould be* pl. 118. 13 Vin. Abr. 246. pl. 18.

writ

writ of covenant; but every ſtranger may take the remainder, but I preſume that this is miſreported: for this will be no taking of the immediate eſtate by the grant and render, but by him who was party to the acknowledgment; but in remainder, a ſtranger may take, as by a caſe put there for example, fully appears: and ſo are the books in 42 *E.* 3. 2. 16 *E.* 3. *Bro. Abr. Tit.* Fines, 3. 7 *E.* 3. 64.

A Fine levied between *A.* and *B.* and *A.* acknowledged to *B.* and he renders to *A. to hold to him* and *E.* his wife, *and to the heirs which* A. *ſhall beget on the body of* E. There *E.* has nothing; for ſhe is not named in the premiſſes, but in the *habendum*, and ſhe was not a party to the *writ of covenant*. 24 *E.* 3. 28.

The Seventh Reading.

THREE parts are neceſſary for levying every fine, *viz.* conuſor, and conuſee, and a competent court to take and record the acknowledgment of the parties.

What perſons may grant by fine.

If a dean be ſeiſed of certain lands, as of his diſtinct poſſeſſions, the dean may make acknowledgment; but if the dean be jointly ſeiſed with his chapter, he and the chapter cannot levy a fine; the law is the ſame of a mayor and commonalty, and of all other joint corporations; they cannot make any acknowledgment, but otherwiſe it is of all ſole corporations; and the reaſon is, becauſe no one can make acknowledgment by attorney, and corporations aggregate of many cannot appear in their own perſon.

Prior dative. If a prior dative and removable, who has no convent, nor common ſeal, levies a fine,

Parſon. this ſhall bind his ſucceſſor for ever; but a perſon, who cannot have *a writ of right*, ſhall not bind his ſucceſſor by levying ſuch a fine. 2 *R.* 3. 5. 12 *H.* 4. 11 *E.* 2.

If a patron alone grants rent by fine, this grant is void to bind the church. By the court, 38 *E.* 3. 5. 8.

Infant. An infant ought not to levy a fine, and the juſtices in diſcretion will not accept ſuch fine. It ſhall bind the infant, if he does not avoid it during his minority, notwithſtanding any ſtatutes: as has been adjudged, contrary to the opinion of *Catlyn* C. J. in *Stowel*'s caſe.

Married woman. A married woman ought not to levy a fine, unleſs ſhe be examined; in purſuance of the ſtatute of 18 *Edw.* 1. *ſtat.* 4. called *Modus levandi Fines*, and yet, if a married woman with her huſband levies a fine without any examination, this ſhall bind the wife, and her heirs for ever, and there is no remedy to reverſe it. But the juſtices would be guilty of a great offence, if they accept ſuch fine without any examination; and therefore they always *ex officio* examine the wives.

Upon this reaſon, if a fine be levied to the huſband and wife, of certain lands, they cannot grant and render a rent to the conuſor, out of the lands, becauſe the juſtices cannot examine the wife, inaſmuch as the rent is not contained in the *writ of covenant*; and yet in our books ſuch grants and renders have been accepted.

Man of non ſane memory, &c. If a man of *non* ſane memory, idiot, a man born dumb, blind, and deaf, or by dureſs,

and

and fear of impriſonment, or threat of life or limb levies a fine, if the juſtices take it, it is good enough, and ſhall for ever bind; but the juſtices, if they were apprized of ſuch imperfections and diſabilities in the conuſor, of their diſcretion would not take ſuch fines.

If a married woman alone levies a fine, if the huſband dies before he enters and defeats it, this ſhall bind the wife and her heirs for ever. 7 *H.* 4. 23. 2 *R.* 3. 10. 9 *H.* 6. 33. *Married woman alone.*

So if a married woman takes another huſband, and ſhe with her ſecond huſband levies a fine, if the firſt huſband dies before any entry made by him, it ſhall bind the wife and her heirs for ever, and yet one book ſays the contrary, 32 *H.* 6. 27.

If a married woman as a ſingle woman levies a fine executory, and afterwards execution is ſued out againſt her and her huſband, the huſband makes default, and the wife is received, ſhe ſhall defeat her own fine for the benefit of the huſband; as it has been adjudged in one book, and yet ſhe appears in manner as a ſingle woman. 17 *Aſſ.* 17.

If a man makes an acknowledgment in my name, and hereupon a fine is levied, though they are none of my name, I ſhall well avoid it in pleading; as to ſay there are two *E. C.* one of *D.* and that I am *E. C.* of *S.* and that *E. C.* of *D.* levied the fine, without that, that *E. C.* of *S.* levied the fine; and this ſhall avoid the fine. 1 *H.* 4. 6. and yet 34 *H.* 6. 19. *Danby* held the contrary.

The Eighth Reading.

What perſons may be conuſees.

AN acknowledgment, as has been ſaid before, cannot be made to him immediately, who is not a party to the *writ of covenant*; but by way of remainder it may be.

A fine cannot be levied to two men, and to their heirs; for the juſtices will not take ſuch a fine. But ſuch a fine levied by the king is good enough, the juſtices will not refuſe ſuch fine; ſo the king's tenant may levy a fine to ſeveral and their heirs, for the king's benefit. 33 *H.* 6. 52. 7 *H.* 4.

Corporation aggregate, acknowledgment taken by attorney.

A fine levied to a corporation aggregate of many, is good enough; for a man may receive a fine by attorney; but not levy a fine by attorney, by the expreſs words of the ſtatute of 15 *Edw.* 2. made at *Carliſle*, by which it is provided, that *the parties to the fine ſhall appear perſonally before the juſtices, that their age, idiocy, or other defects may be judged of by them*; and you muſt know, that all ſuch perſons who may be grantees, may be conuſees.

Maxim.

What court is ſufficient to take an acknowledgment.

If a fine be levied in the *King's Bench*, it is not void, but voidable by *writ of error*. 36 *H.* 6. 34.

Note, That by the ſtatute, called *Modus levandi Fines*, it is provided that a fine ought to be levied before four juſtices in the Bench, or in *Eyre*, and by none others; but now by the ſtatute of 4 *H.* 7. *cap.* 24. a fine levied before the juſtices of the *Common Pleas* is good; there ought to be only two juſtices.

Before two juſtices.

If

If the king by his letters patent grants to another conuſance of all manner of pleas and executions thereof; or a grant *to hold pleas, &c.* yet ſuch patentee cannot have conuſance, nor hold plea of covenant to levy, *&c.* 44 *E.* 3. 37.

Note, That it is ſaid in our books that if a city or a town corporate have uſed, time whereof the memory of man does not run to the contrary, to hold all manner of pleas as well touching the realty as the perſonalty; or if a city or town corporate has any ſuch franchiſe by the king's grant, yet they cannot levy fines. But *Brooke* ſays, that if they have uſed to levy fines there, this is well enough; but under correction I cannot ſee, how ſuch fines ſhould be good, for it is expreſly againſt the ſaid ſtatute called *Manner of levying fines*, which provides that none ſhall be levied but only in the Common Pleas, or before juſtices of Oyer. So that no fine can be levied in any other place, unleſs that it is eſpecially done by ſtatute, (as it ſeems to me) as a fine cannot be levied in ancient demeſne for the cauſe aforeſaid, and becauſe it is not a court of record. But fines may be levied within the county palatine of *Lancaſter*, and within the county palatine of *Cheſter*; but it is underſtood that this is by virtue of diverſe acts of parliament in ſuch caſes made and provided: and it may be in any cities or towns corporate where they have been uſed to levy fines, if all their uſages and cuſtoms be confirmed by act of parliament, they may levy fines there; but ſuch fine ſhall not bar any eſtate-tail, nor any ſtrangers who have preſent or future right.

The

The Ninth Reading.

Who may take an acknowledgment by Dedimus poteſtatem.

NOTE, That it is provided by a ſtatute made at *Carliſle* 15 *E.* 2. *That if any old weak or decrepit man cannot come, then let two juſtices or one juſtice, (if one be preſent) together with an abbot, prior, or knight, have the power of going to him and take his acknowledgment.*

But it is uſual at this day for a judge, ſerjeant, or knight, to take an acknowledgment ſolely by writ of *dedimus poteſtatem*, the which is directly contrary to the letter of the ſaid ſtatute. For the purview of the ſaid ſtatute is, that two juſtices or one juſtice taking with them an abbot, prior, or knight, &c.

It ſeems to me that if a fine be levied before any by virtue of a *dedimus poteſtatem*, who is neither judge, abbot, knight, or ſerjeant, that it is erroneous, and may be reverſed in the King's Bench by writ of error; but it is ſaid in old *natura brevium*, that a ſerjeant ſworn to the king may take an acknowledgment by *dedimus poteſtatem*, and yet he is not named in the ſtatute.

If a knight be created an earl, yet he may take an acknowledgment by *dedimus poteſtatem:* but if an abbot be created a biſhop, he cannot take an acknowledgment.

If a fine be levied to one of the juſtices of the Common Pleas, or to a ſerjeant of the law, or to a knight, and the ſame juſtice, ſerjeant, or knight takes the acknowledgment of the fine, this is altogether void, *becauſe he is a judge in his own cauſe.* 8 H. 6. by *Martyn.*

If

If a ſerjeant has the queen's patent to be the chief juſtice of the Common Pleas, he may take an acknowledgment before he be ſworn, without a *dedimus poteſtatem*. *Without a dedimus poteſtatem.*

Note, That it is provided by the ſtatute of 18 *E.* 1. which is called the ſtatute *de finibus*, that a fine ought to be levied at leaſt before four juſtices of the Bench, or in *Eyre*: but now it is provided by the ſtatute 4 *H.* 7. *cap.* 24. that fines levied before the juſtices of the Common Pleas ſhall be good, ſo that if there be two juſtices, the fine levied before them is good; but if they be all dead except one, a fine levied before him (in my opinion) is not good, nor available, but erroneous.

The chief juſtice of the Common Pleas may take an acknowledgment in the country without any writ of *dedimus poteſtatem*, and ſo cannot the chief juſtice of *England*, nor any other of the queen's juſtices; and this ſeems to be by cuſtom and uſage: for I do not find any ſuch ſpecial authority, given to the chief juſtice of the Common Pleas by any ſtatute.

You muſt know that the direct order and courſe of levying a fine is, firſt to ſue out a writ of covenant or other original writ, and then the *dedimus poteſtatem*, and then to make the acknowledgment, for the *dedimus poteſtatem* recites the writ of covenant to be depending, and yet it is commonly uſed to take the acknowledgment firſt, and then purchaſe the writ of covenant with an antidate.

If the *dedimus poteſtatem* be of an earlier date than the original writ of covenant, it is error. *Note.*

If a juſtice takes an acknowledgment, and afterwards the king dies before any writ of covenant

Acknowledgment void by the king's death.

venant or *dedimus poteſtatem* upon the acknowledgment, it is altogether void. So it ſhould be (as it ſeems to me) at Common law, if the writ of covenant or *dedimus poteſtatem* had been ſued, and an acknowledgment taken, and afterwards the king dies, that ſuch acknowledgment ſhould not be received; but now at this day, it is otherwiſe; for now a writ does not abate by the death of the king, (ſee *Stat.* 1 *An. c.* 8. *f.* 5.) but in the ſame caſe if the king's ſilver had been entered upon the back of the acknowledgment, then the death of the king, nor the death of the conuſor, nor of the comſee ſhall make the acknowledgment void: but if the king's ſilver be entered, tho' it be not certified in the life-time of the conuſor, this is good enough; as if a fine be acknowledged before a judge and the conuſor dies, this may be inrolled afterwards.

If the judge takes the acknowledgment, and dies, a *Certiorari* ſhall be awarded to his executors to certify the acknowledgment. *Fitz. Abr.* 147.

The Tenth Reading.

AND it is to be known, that if the juſtices accept a fine without any original writ, this fine is not void, but voidable by error in the King's Bench, for it is not *coram non judice*, inaſmuch as the juſtices have power of the matter, though they proceeded in *inverſo ordine*. So it is in an original writ, if the plaintiff be withdrawn, and a *retraxit* entered, and afterwards the parties agree in court in nature of a fine, and the court accepts it, it is error; for the

the original is determined, and the parties have no day in court. 37 *Aſſ. p.* 17. *Bro. Abr. Tit.* Fines, 82 *.

In a writ of annuity, the defendant may levy a fine to the plaintiff; ſo in a writ of *rationabilibus diviſis*. If a fiſhery or other thing be leaſed by the demiſors to one of the parties in conſideration thereof, that party may levy a fine of an annual rent to the other for the ſaid fiſhery, and this fine is good enough and receivable. In a writ of *Meſne*, the defendant may acknowledge the acquittal by fine. 20 *H.* 6. 3. *a.*

In *Warrantiâ chartâ, to warrant one acre*, the defendant may acknowledge all the right that he has in this acre to the plaintiff, and the fine is well enough receivable: So if at this day the defendant would levy a fine of the ſame acre, and of another acre, the fine is not good for the other acre, for it is not compriſed in the original. 20 *H.* 6. 3. *a.*

* *By this paſſage my lord* Coke *ſeems to think, it had in all ages been the law of this realm, that a fine could not be levied without an original writ. Whereas in* Eaſter *term.* 21 Edw. 4. *In the abbot of* Merton's *caſe,* Tremayle *ſaid* "*I think a fine may be levied without an original; a fine is nothing more than a covenant between the parties, and recorded by the juſtices; and if it be before juſtices of record, the parties being preſent, it ſeems good, for the writ is ſued only to the intent to make the parties appear, and if they are preſent and will appear* gratis, *it is not neceſſary to have a writ, but they may make a final covenant by record of the juſtices. And a fine is but a covenant of record. Year book* Paſchæ anno xxi E. iiii. fol. 4. N°. 8. Brigges *and* Bryan *ſeem to be of the ſame mind, ibid.* Mich. 21 *E.* 4. fol. 60. N°. 32. *ibid.* fol. 62." Mad. *diſſert. concerning ancient charters and inſtruments prefixed to his* Form. Anglican. xviii.

In

In an attaint upon a writ of *Ayel* a fine may be levied; ſo in a *quod permittat* of a way, a fine may be levied thereof.

In ancient time in *quare impedit*, a fine might have been levied of an advowſon; but at this day ſuch fine is not receivable, becauſe it is but a perſonal action. But in the time of king *Henry* the *Third*, fines were wont to be levied in ſuch perſonal actions; but in a writ of *meſne*, *warrantia chartæ*, *quem redditum reddit*, *per quæ ſervitia*, *quid juris clamat*, a fine may be levied of lands compriſed within the writ; and yet no land is demanded, or ſhall be recovered in them. But as *Statham* ſays, in all writs wherein land is demanded, or upon other writ, which charges land; a fine may be levied of the land compriſed in the writ.

Maxim.

In times paſt fines were as uſually levied upon a writ of *Warrantia chartæ*, as now they are upon a writ of covenant: but in all actions wherein land is demanded not to be charged, a fine cannot be levied, and in perſonal actions a fine may be levied. In an aſſiſe *de darrein preſentment*, the plaintiff acknowledges the advowſon, whereby the wife grants an annuity.

The Eleventh Reading.

IF a *Precipe* be brought againſt tenant for life, and upon his default, he in reverſion is received, he in reverſion may levy a fine to the demandant of this reverſion, and yet no writ is depending between them. 18 *E.* 2. 82. 21 *E.* 4. 5. The ſame law of vouching and praying in aid. 5 *H.* 8. 7.

A fine

A fine may be levied *of a free ſheep-fold*, as of a thing in groſs, and it ſhall be received. 1 *E.* 3. 32. *Of what things a fine may be levied. Of a* free ſheepfold.

A fine may be levied of every thing whereof a *precipe quod reddat* lies, and a fine may be levied of ſome things whereof no *precipe* lies: as a fine may be levied of a paſture for two oxen, for of this a *precipe quod reddat* lies. 4 *E.* 4. 2. 27 *H.* 8. 12. *Of all things whereof a* Precipe *lies.*

A fine may be levied of common of paſture, and yet no *precipe* lies thereof. 4 *E.* 4. 2. 27 *H.* 8. 12. *Of common of paſture.*

A fine may be levied of a Corody, for of this lies *nuper obiit.* 17 *E.* 2. 10. *Aſſ.* 11. 4 *E.* 4. 2. *Of a Corody.*

A fine may be levied of an office, and yet no *precipe* lies thereof, nor an aſſiſe at the Common law, but only a *quod permittat.* 7 *H.* 6. 8. *Of an office.*

A fine may be levied of the cuſtody of a foreſt, for thereof lies a *precipe.* 27 *H.* 8. 12.

A fine may be levied of an annuity, and yet it is a perſonal thing. 11 *H.* 4.

See 13 *E.* 3. *Tit.* Fines, 68. Covenant was brought of a market, and *Keles* would have drawn the concord, *but the court would not allow it*, for a *precipe* does not lie thereof; and yet a fine may be levied of a *Boylery*, and yet no *precipe* lies thereof. 19 *Aſſ.* 12. *Of a market.*

A fine may be levied of a way in *quod permittat*, and yet no *precipe* lies thereof. 2 *E.* 3. 13. *Of a way.*

A fine may be levied of a rent newly created, and yet no *precipe* lies thereof; and yet ſome opinions are to the contrary. 10 *E.* 4. but afterwards in 22 *E.* 4. it is adjudged. 19 *E.* 3. *Tit. Abbe* 13. *Of a rent.*

A fine

Of a fiſhery. A fine may be levied of two pools and fiſheries, in the water of *D.* 1 *E.* 3. 4. *a.*

Writ of covenant with an exception, and the fine without exception. If a writ of covenant be brought of a manor excepting an houſe, and thereof a fine is levied without any exception, yet the houſe ſhall not paſs, becauſe it was not contained in the writ. 38 *E.* 3. 17.

For things not compriſed in the writ of covenant. So if *quod permittat* be brought of a way, and the defendant levies a fine of the way, and alſo of a mill, and of paſture, not compriſed in the writ, it is adjudged that the ſuit is void, for all the things not compriſed in the writ or covenant, and yet in former times ſuch fines have been received. 2 *E.* 3. 19. 19 *E.* 3.

Note, That it is ſaid in our books, that if the fine be levied of any thing, which is not compriſed in the writ of covenant, or other original, or which does not iſſue out of the ſame thing, contained in the writ of covenant or other original, that the fine for ſuch thing as is not expreſſed in the writ of covenant, is void. And therefore if land be only contained in the writ of covenant, the grant and render may be of a rent iſſuing out of land contained in the fine. 19 *E.* 3. *Bro. Abr. Tit.* Grants, 90. but ſee there for the ſame caſe in 9 *E.* 4. adjudged that a writ of covenant was brought of five ſhillings rent, and the fine was levied of an annuity.

But it is adjudged in our books, that where one *Ritche* brought an aſſiſe of *darrein preſentment*, againſt a prior, who came into court, and levied a fine and releaſe of the advowſon to the plaintiff, whereby the ſaid *Ritche* by aſſent of the ordinary granted an annuity to the ſaid prior, and his ſucceſſors for ever; *to be received*

ceived by the hands of the parſon of the church, whoever he ſhall be; and it was adjudged a good grant, and yet the annuity was not contained in the writ of covenant, nor iſſuing out of the thing contained in the writ. 31 *E.* 3. *Bro. Tit.* Fines, 90.

The Twelfth Reading.

AND it is to be known that every *Precipe* ought to be brought in a town, or in a place known out of the town, and not in an hamlet. But yet a writ of *Dower* and *Aſſiſe* lies in an hamlet; for in *Aſſiſe* the plaintiff recovers by view of the jurors, and in *Dower* the demand is not certain, but *reaſonable dower*, &c. yet a writ of waſte lies in an hamlet. 7 *H.* 4. 8. *a.* and *Hanch* there ſaid, if the place in which the writ was brought is a manor, or ſuch place, the writ was well enough brought. *What writs may be brought in a town or place known, and what in an hamlet.*

All perſonal actions ought to be brought in an hamlet.

Note, that it is ſaid in 2 *H.* 5. 7. 8. That a fine cannot be levied in an hamlet, and if the juſtices are appriſed thereof they will not receive ſuch fine. But ſee *Bro. Abr. Tit.* Fines, 71. 7 *E.* 6. where it was agreed by all the juſtices that a fine and writ of *Dower* might be brought in an hamlet; and ſo ſaid in 38 *H.* 3. 20. by *Thorpe*, that he had ſeen a fine levied in an hamlet. But *Hale* ſaid in 1 *H.* 8. 9. *a.* That if a fine be levied in *A. B.* and *C.* and neither of them is a town or hamlet, but certain manſions or houſes, if this be accepted, it is good.

Aſſiſe brought in *New Foreſt* is good, and yet it is no town, or hamlet. 18 *Lib. Aſſ.* 30.

And yet ſee in 11 *E.* 4. 51. that in a *ſcire facias* to execute a fine levied of lands in *D.* the tenant ſhall not ſay, that there is no ſuch town, for then the fine would be avoided by ſuch plea, which affirms, as it ſeems to me, the opinion before in 2 *H.* 5. 7. 8. that ſuch fine is not receivable, if the juſtices are appriſed that the place is but an hamlet. But yet if ſuch fine is accepted, it is good enough and ſhall not be avoided by ſuch plea, for the party and all thoſe who come in under him, are eſtopped to ſay that it is no town.

But it is ſaid in 8 *E.* 4. 6. That a *ſcire facias* may be brought in an hamlet.

A fine may be levied of a caſtle, or of a manor, without expreſſing in what town or hamlet.

It is ſaid in our books, that at Common law before the ſtat. of *W.* 2. *Whereas of thoſe things which are recorded, &c.* that if a fine executory was not executed, that the party ſhall not have a writ *de fine facto* in the which the plaintiff recovers only damages; but under correction, before the ſaid ſtat. of *W.* 2. the conuſee might have entered upon the conuſor and his heirs, for the ſaid ſtat. does not give any entry to the conuſee or his heirs.

If a fine be levied of lands in tail, the remainder in tail, the remainder in fee, and afterwards the fine is put in the treaſury, and afterwards the tenant in tail dies without iſſue, and afterwards he in remainder removes the fine into chancery, and from the chancery into the Common Pleas by *Mittimus* to have execution

cution of the ſaid fine, and before execution ſued out, he in remainder dies without iſſue, he in the laſt remainder ſhall not have a *ſcire facias* to have execution without a new command: but in the ſame caſe, if he in remainder in tail had had iſſue, and had died before execution ſued out, yet his iſſue might have a *ſcire facias* without a new command.

He to whom a remainder was made by fine, ſued out an *habere facias ſeiſinam* to the ſheriff, and the ſheriff returned that he could not make execution by reaſon of reſiſtance; and it was adjudged that his return was wrong, and the ſheriff was amerced 20 marks.

It is ſaid in 1 *E.* 4. 6. that of a fine levied before time of memory, a man ſhall not have a *ſcire facias* at this day for execution thereof.

A fine executory may be executed before the fine is engroſſed; before the indentures of the fine made and delivered to the parties. *Executory.*

The Thirteenth Reading.

IT ſeems to me, that before the fine be engroſſed that the record of the fine ſhall remain with the chirographer; and this is the reaſon why a fine cannot be levied in the king's bench, becauſe there is no chirographer; and ſo, for the ſame reaſon the record of the fine ſhall not be removed by *writ of error*, but only a tranſcript of the fine, and this appears plainly in our books. *Chirographer keeps the fines.*

It appears alſo in our books, that immediately after the fine is engroſſed it is to be ſent into the treaſury. 17 *E.* 3. *When they ſhall be ſent into the treaſury.*

Cuſtos Brevium.

Before the ſtat. of 5 *E.* 4. *c.* 14. The *Cuſtos Brevium* had nothing to do with fines; but now it is given by the ſaid ſtat. that the chief clerk of the Common Pleas who is the *Cuſtos. Brevium*, ſhall keep a record *viz.* the note of the fine, or fine; that if the notes in the care of the chirographer, or the notes of the fine be imbeziled *&c.* that a man ſhall have recourſe to the ſaid roll for execution, *&c.* upon which it appears clearly, that the record remains with the chirographer if it be not imbeziled, is ſufficient for ſuing out execution.

Order of execution upon a fine in the treaſury.

Then when the fine is engroſſed, and put in the treaſury, he who would have execution ſued, ought to remove it out of the treaſury by *Certiorari* directed to the treaſurer and chancellor of the Exchequer, into the Chancery, and from the chancery ſent into the bank by a *Mittimus*; and then from hence the conuſee, or his heirs, or he in remainder (as the caſe is) ſhall ſue execution by *ſcire facias.*

It is ſaid in our books, that becauſe the *ſcire facias* iſſues out of the record of the fine, that it ought to agree with the fine in every point. 4 *H.* 7. 7.

And yet if the town be omitted in the fine, the *ſcire facias* ought to expreſs it, and ſo in this caſe the *ſcire facias* will vary from the fine. 38 *E.* 3. 19.

So it is ſaid in ſome books, that if a fine be levied in an hamlet, the *ſcire facias* ought to be brought in a town. 4 *E.* 3. 14. 38 *E.* 3. 19.

The

The Fourteenth Reading.

BY the order of the Common law, if a fine had been levied *ſur conuſans de droit come ceo que il ad de ſon done*, and the conuſee had granted and rendered the tenements to the conuſor in fee, ſo that the conuſor continued always in poſſeſſion without any tranſmutation, and the year and day paſſes, yet he who had right, was not bound by the order of the Common law, as is held by the better opinion in 7 *E.* 3. the law is the ſame; as there ſaid of a *writ of right*, that if a judgment be given, and no execution ſued, that there is no occaſion for him who has right, to make entry or claim, and ſuch opinion is affirmed in *Pl. Com.* 357.

The year and day in which a ſtranger is to make his claim, is of the fine levied, and not of the execution ſuid.

But it ſeems to me, that by the order of the Common law, if a fine had been levied *upon grant and render*, or other fine executory, and he who had right, did not enter, or make his claim within the year and day after the fine levied, though execution was not ſued, that all ſtrangers were barred; as well upon a fine executed, as upon a fine executory, and execution ſued. And that for two cauſes; one becauſe the day and year ſhall be accounted from levying the fine, and not after execution ſued; for if a fine had been levied in *Mich.* term, and execution ſued out in *Hil.* term, the year and day ſhall be accounted from levying the fine, and not from the execution ſued out. For *mittimus* that execution be ſued after the year, after the fine levied, he who had right ſhall not have a year and day after the execution ſued out. Another reaſon is, becauſe, that

the cauſe wherefore a fine is a final bar to all ſtrangers, is not by the tranſmutation of poſſeſſion, and the notice which may come thereby, but in the ſolemnity which is in the king's court upon levying a fine, made it to be a good bar to all ſtrangers. For it is to be intended, that the ſtrangers would have ſooner notice of the fine with ſuch ſolemnity levied openly in the king's court, than of an execution had, which may be made privately, *&c.* and of ſuch opinion are two books. 4 *E.* 4. 46. 11 *R.* 2: and note, that it is ſaid in the end of our ſtatute. *Let fines which are to be levied in our court be publicly and ſolemnly read, and that pleadings in the mean time ceaſe, and let this be done twice a week.*

The law is the ſame in a *writ of right*, the year and day ſhall be accounted from the judgment given, and not from the execution ſued out. And the reaſon, that in a writ of right a judgment ſhall be final, was for the trial by grand aſſiſe, or by battail, which trial is public, famous, and notorious; but when judgment after iſſue joined, had been given by default, proclamations in ſuch caſe uſed to be made before judgment, whereby men might have greater notice. But if judgment had been given upon default, and not after iſſue joined, it would not have been a bar to ſtrangers by the Common law. 7 *H.* 4.

In a *writ of right*, at the Common law, if the tenant had vouched, and the grand aſſiſe paſſed for the demandant, for which the demandant had judgment againſt the tenant, and the tenant over againſt the vouchee, in this caſe of lands recovered againſt the tenant, he who

who has right, ought to put in his claim, or make his entry within the year and day after judgment. 26 *H.* 8. 10 *H.* 6. But of lands recovered in value, there is no occaſion to make a claim, neither after judgment, nor after execution; *the reaſon is evident.*

The Fifteenth Reading.

IF a diſſeiſor is diſſeiſed, and the ſecond diſſeiſor levies a fine, and within the year the firſt diſſeiſor puts in his claim, but the diſſeiſee neither enters nor claims, the year and day paſſes, now the diſſeiſee is barred; but if the firſt diſſeiſor enters by reaſon of his claim made within the year and day, now the fine is avoided, and the firſt diſſeiſee may enter upon him. 19 *E.* 2. *Fitz. Abr. Tit.* Continual claim. *Entry revived after it was barred.*

The law is the ſame if a diſſeiſor had made a feoffment in fee upon condition, and the feoffor had levied a fine and the year and day had paſſed, now the diſſeiſee is barred; but if the feoffor enters for the condition broken, now the diſſeiſee may enter upon him. *Pl. Com. Stowel's* caſe, 353.

If a diſſeiſor of two acres levies a fine of both, the diſſeiſee may enter into one acre only, and this ſhall not be an entry into both, though they be in the ſeiſin of one and the ſame perſon, and of one and the ſame title. So if a man makes a leaſe for life of two acres upon condition, and afterwards the condition is broke, the leſſor may enter into one acre only, and waive the benefit of the other acre, and yet the condition is entire; by *Cotteſmore.* 1 *H.* 6. 4.

If a diſſeiſor makes ſeveral leaſes for life, or feoffments in fee of diverſe parcels, if the diſſeiſee enters upon the diſſeiſor in name of the whole, or upon one leſſee or feoffee in name of the whole, this ſhall not diveſt the freehold, which is in the other perſon; though it is all of one and the ſame title. But if diſſeiſor be of 3 acres, and leaſes one of them to *J. S.* for years, and another to *J. N.* for life, and the third he retains in his poſſeſſion, and the diſſeiſee enters upon the diſſeiſor in name of the whole; this ſhall veſt in him, as well the acre as was in leaſe for years, as the acre which was in the ſeiſin of the diſſeiſor; and the reaſon of this diverſity is, becauſe every entry ought to purſue the nature of his action; and as the diſſeiſee ought to have ſeveral *Precipes* againſt ſeveral tenants of the freehold, ſo he ought to make ſeveral entries.

If two men diſſeiſe me of two ſeveral acres, ſeverally, now the entry upon one, cannot be the entry upon the other; but if the one diſſeiſe the other, ſo that all comes into one hand, there the entry into one acre, in name of both, is an entry into both; for he may have a *Precipe*. 9 *H.* 7. 25.

But if I enfeoff one upon condition of an acre, and after I enfeoff him of another acre upon condition, and afterwards both the conditions are broken, if the feoffor enters into one acre, in name of both, this ſhall not veſt both in him; for by one title the feoffor could not have an action, and always an entry ought to purſue his action.

If I be diſſeiſed of two acres which lie ſeverally, and are in ſeveral places, or towns; if I enter

enter generally into one acre, it is not an entry into both. The law is the ſame in all caſes, when the freehold is out of a perſon, if the diſſeiſee enters generally into one parcel, this ſhall not recontinue both; for it may be, that the diſſeiſor, or the feoffee hath warranty, and therefore the general entry into one parcel ſhall not defeat both. But if a man be ſeiſed of 1000 acres in fee, and dies ſeiſed, leaving iſſue a ſon and a daughter by one venter, and a ſon by another venter, and the eldeſt ſon enters into one acre generally, this ſhall cauſe *poſſeſſio fratris* in all; for the whole freehold in law was in him before, and no freehold veſts out of any perſon in prejudice of him, by his warranty, or otherwiſe. 21 *H.* 7. 33.

The Sixteenth Reading.

Where an eſtate ſhall veſt by continual claim or not.

CONTINUAL claim made out of the land, when the party may enter without fear of death, or battery, is void; alſo continual claim ſhall not avail the party, when his entry is not lawful, unleſs it be in ſpecial caſes. As if the diſſeiſee dared not enter without fear of death, or battery, and he comes within view of the land, and claims the land, the claim is void; and yet livery may be of the land within the view, but nothing ſhall paſs till the feoffee enters.

It is ſaid in our books, that if the diſſeiſee dare not enter into the land for fear of death, or battery, yet he ought to come within the view of the ſame land, or otherwiſe his claim ſhall not avail him; and iſſue hath been taken in ſuch caſe if he was within the view, or not, yet

yet *Littleton* ſaid, that he ought to go as near to the land as he dares. 38 *Aſſ. pl.* 23. is that if the diſſeiſee dares not enter, claim made among his neighbours is good enough; but it is there ſaid, that livery may be made within the view, as well as a continual claim.

If the diſſeiſee makes continual claim, and notwithſtanding this the diſſeiſor dies, his heir within age, and the king, after office, ſeiſes the ward of the land, the diſſeiſee cannot enter; but yet the opinion of one of the juſtices was, that to avoid the diſcent, the diſſeiſee may make continual claim. *Quære.*

Tenant for life is diſſeiſed, a collateral anceſtor of him in reverſion releaſed to the diſſeiſor with warranty, he in reverſion came to the land, and there he claimed his reverſion to avoid the warranty; this claim ſhall not avail him. The law is the ſame (as it ſeems) if leſſee for years be ouſted, and he in the reverſion is diſſeiſed, the leſſor cannot make continual claim, becauſe every continual claim ought to countervail in law an entry, and becauſe his entry is not lawful, his claim is not good. *Yet quære.*

The Seventeenth Reading.

Where an eſtate ſhall be defeated without entry or claim, and where not.

THERE is a diverſity between eſtates which paſs by livery, and eſtates which paſs ſolely by grant; for eſtates which paſs by livery cannot be defeated without entry, or claim; but otherwiſe of eſtates which paſs by grant only; and therefore if a man made a feoffment in fee, gift in tail, or leaſe for life upon condition, that if the leſſee did ſuch an act, that then his eſtate ſhould ceaſe, though the feoffee,

feoffee, donee, or leſſee ſhould do ſuch act, yet his eſtate ſhall not be defeated, before an entry. But if a man granted a rent, advowſon, common, or *the like*, which lie in grant, in fee, in tail, or for life upon condition, that if the grantee, donee, or tenant for life did ſuch an act, that then his eſtate ſhould ceaſe, or ſhould be void, in ſuch caſe by the act done, the eſtate is defeated, before any claim.

And as to eſtates, which paſs by livery, there is alſo a difference when the feoffor, donor, or leſſor may enter; for there he ſhall have nothing before his entry, as in the caſe before; but when the leſſor, donor, or feoffor cannot enter, there the law will adjudge the eſtate in him again without any claim; and therefore if a man makes a leaſe for five years, upon condition, that if the leſſee ſhall pay 10*l.* to the leſſor, within the firſt two years, that then he ſhall have it in fee, and afterwards the leſſee does not pay within the two years, now the fee and freehold ſhall reveſt in the feoffor, before any claim; and this is the opinion of Mr. *Littleton*; ſo for the ſame cauſe, if a man makes a feoffment in fee upon a collateral condition, and the feoffee leaſes it again to the feoffor for years, and afterwards the condition is broke, now the fee and freehold ſhall reveſt in the feoffor without any claim. 36 *E.* 3.

And as to eſtates which paſs by grant, there is alſo a diverſity, when the condition annexed to ſuch eſtates is, that the eſtate ſhall be void, and when the condition is upon condition, that the grantee ſhall do or ſhall not do ſuch act; and therefore if a man grants an advowſon in fee upon condition, that if the grantee ſhall not do ſuch

ſuch act that then the eſtate ſhall be void, and afterwards the grantee does not do the act, now the fee and freehold ſhall be in the grantor without any claim, but if a man grants an advowſon upon condition that the grantee ſhall pay to the grantor 20 *l.* at ſuch a feaſt, now if the grantee does not pay the money accordingly, yet the eſtate is not void before claim made; but of things lying in grant, there is another diverſity; for of things newly created, though the condition be not, that then the eſtate ſhall be void, but only upon condition, that he ſhall do, or not do ſuch an act, yet the eſtate ſhall be void before any claim; and therefore if a man grants a rent newly created upon condition, that the grantee ſhall pay 20 *l.* at ſuch a feaſt, and afterwards the grantee does not pay the money at the ſaid feaſt, the eſtate ſhall be defeated without any claim.

The Eighteenth Reading.

The reaſons for making this ſtatute.

THE miſchief, error, and miſconſtruction of law, before the making of this ſtatute was ſuch, that when a man had been lawfully ſeized of lands in fee, and had levied a fine to a ſtranger *ſur conuſans de droit come ceo que il ad de ſon done*, (for upon no other fine can a grant and render be made) and the conuſee had granted, and rendered the ſame land back again, to the conuſor in fee-tail, for life, or for years, the heirs of the conuſor, becauſe the fine was to their prejudice, were ſuffered and permitted to have, of what before the fine was levied, and at the time of levying the fine, and all times ſince, their anceſtor was ſeized;

ſeized; and ſo by the ſufferance and allowance of the then juſtices, ſuch fines were avoided. 13 *E.* 3.

So where tenant in fee had accepted an eſtate by fine from him, that had nothing for life, or in tail, ſo that by law the conuſee and his heirs are concluded, and eſtopped for ever to claim other eſtate; yet before the making of this ſtatute, the ſaid averment was received in avoidance of ſuch fines, and for thoſe two cauſes, and in affirmance of and for reſtoring the ancient Common law of *England*, this ſtatute was made.

But it ſeems to me, that the firſt of the ſaid two errors, or miſconſtructions of the law, permitted and ſuffered before this ſtatute was made, was too abſurd, and manifeſtly contrary in itſelf; for the heir of the conuſor endeavoured, by ſuch averment, to avoid the particular eſtate retaken by his anceſtor by the render; becauſe he, that rendered, had nothing, it ſeems to me, that in endeavouring to gain the fee-ſimple, he loſes not only the fee-ſimple, but alſo the eſtate for life, or other particular eſtate, which was rendered; for though the render was void, as then *minus juſte* was allowed, yet the fine *ſur conuſans de droit come ceo que il ad, &c.* was good, and then the ſaid fine being good (for the imperfect or inſufficient render cannot impeach it) and the render being void, the recogniſee ſhall retain the land, and the heir of the recogniſor is utterly barred for ever; and therefore the words of this ſtatute are true, *viz.* that ſuch averments were *contra leges et conſuetudines regni noſtri antiquit. uſitat.* (againſt the laws and cuſtoms of our kingdom anciently uſed) and

theſe

theſe (as it ſeems to me) were the cauſes of this ſtatute.

The Nineteenth Reading.

THE Grammarians ſay, *That an heir is ſo called from adhering, becauſe, as they ſay, he, who is heir, adheres, that is, is next to him, whoſe heir he is.*

Others ſuppoſe that this word *Heir* is derived *from hero; maſter becauſe he is the owner of inheritances', which belong to him.*

Alſo ſome ſay that *Inheritance* is derived from *an heir*, yet in our law *he is called an heir from inheritance*, and ſo the makers of this ſtatute underſtood it.

Bracton ſays, *That an inheritance is a ſucceſſion to an univerſal right which the deceaſed anceſtor had, be it from whatever cauſe of acquiſition or ſucceſſion it may, with ſeiſin or without, as if he was ſeiſed at any time in his life of the ſeiſin, or at his death, that is to ſay, on the day he died.*

Where one ſhall avoid a fine levied by his anceſtor.

Though this ſtatute ſaith, that the parties to the fines and their heirs ſhall not have averment againſt fines levied, *&c. viz.* that they, or their anceſtors were ſeiſed, *&c.* yet our books do adjudge, that againſt a fine levied by my father, I ſhall ſay, that before the fine, and at the time of the fine, and ſince, I myſelf was ſeiſed, and ſo avoid the fine; for as I have ſaid before in this caſe, I am not heir to my father; for *he is called heir from inheritance*, and I do not claim this land by inheritance.

The law is the ſame, if there be grandfather, father, and ſon, and the ſon might ſay,

againſt the fine levied by the grandfather, that, before the fine, and at the time, and ſince the time of the fine, his father was ſeized.

The ſtatute of 4 *H.* 7. *c.* 24. ſays, that immediately after the fine levied by any perſon, and proclamation paſſed the conuſors and their heirs are barred; yet if the father diſſeiſe his ſon, and levy a fine, and proclamation paſſes, and the father dies within the five years, the ſon is not barred; for he is not heir to his father, as to this land; for *he is called heir from inheritance.*

So the ſtatute of *W.* 2. ſays, *If the diſmiſſion was made by the demandant, or his anceſtor, and a view ſhall not be granted, &c.* yet in *Cui in vitâ*, brought by the heir, of the alienation of his father, the tenant had the view; for he does not claim the land, as heir to the father, but as heir to the mother, and ſo *he is called heir from inheritance.*

If there be father and ſon, and the father levies a fine of the manor of *D.* and afterwards purchaſes the manor, and the conuſee enters, and after the father dies; now (as it ſeems to me) the ſon ſhall be barred. But (as it ſeems to me) it is good to ſee the manner and form of pleading ſuch caſe.

If in the ſame caſe the ſon brings any action anceſtrel, and as heir, and the fine be pleaded in bar, the ſon cannot ſay *that the parties to the fine had nothing*, but if the ſon enter and be ouſted, and brings aſſiſe, and the tenant pleads, that the father of the plaintiff was ſeiſed in fee, and ſo ſeiſed levied a fine, *&c.* the ſon may ſay, *that the parties to the fine had nothing*, but ſuch

ſuch a one whoſe eſtate he hath. By this way the plaint ſhall be tried, and therefore the ſure way for the tenant in ſuch caſe to plead, is to ſhew all the ſpecial matter, how his father levied the fine, and after purchaſed the land, for be the fine executory, or executed, the fine ſhall bar his heir, as it ſeems to me.

The Twentieth Reading.

AVERMENT.

Where the iſſue in tail may aver continuance of poſſeſſion in his anceſtor againſt a fine, and where not.

AGAINST a fine *ſur conuſans de droit tantum, et ſur grante et render*, and againſt a fine *ſur Releaſe*, levied to the tenant in tail, or by tenant in tail, the iſſues may aver continuance of the poſſeſſion in their anceſtor. For, although the ſtatute *de donis conditionalibus* was made 13 *E.* 1. and our ſtatute made 27 *E.* 1. yet it was not the intention of this ſtatute to take away the liberty and benefit of the iſſue in tail, which the ſtatute *de donis conditionalibus* had given to them; for it appears, that the intention of the makers of this ſtatute was to reform ſuch averments, which were *againſt the laws and cuſtoms of* England *anciently uſed*, and not to take away ſuch lawful averments, which by the ſtatute *de donis conditionalibus* were given to the tenant in tail, but againſt a fine *ſur conuſans de droit come ceo, &c.* to which the anceſtor in tail is a party, the iſſue in tail ſhall have averment of continuance of poſſeſſion in his anceſtor againſt the fine in ſome caſes, and in ſome not, and therefore I have taken this diverſity, againſt a fine levied by tenant in tail *ſur conuſance de droit come ceo, &c.* the iſſue in tail ſhall have no averment of conti-

continuance of poſſeſſion; but if a fine *ſur conuſance de droit come ceo, &c.* be levied to the tenant in tail, this ſhall not conclude the iſſue (as diverſe books ſay) to have continuance of poſſeſſion.

The Twenty-firſt Reading.

ESTOPPEL.

IF there be lord and tenant by knight's ſervice, and a ſtranger levies a fine to the tenant in tail, to hold to him and his heirs; in this caſe, *Herle ſaid* that the lord ſhall be concluded; becauſe he is not a meer ſtranger, but is privy in law. But this is not law, (as it ſeems to me) for no man ſhall be eſtopped, but only parties and privies in blood, as heirs, or privies in eſtate, as thoſe who have derived any eſtate from under the eſtate of him that is eſtopped; for privies in law, as the lord is, ſhall not be eſtopped, having regard to his ſeigniory; for in reſpect of this he is wholly a ſtranger; for he does not claim the land, but a thing out of the land.

But if there be lord and tenant, and the tenant accepts a fine of a ſtranger for life, or in tail, and afterwards dies without heir; now the lord ſhall be concluded (as it ſeems to me) for how he claims an eſtate in the land under the eſtate of the tenant who was concluded.

And *note*, that as well he who claims an eſtate in the *poſt* ſhall be concluded, as he who claims the land in the *per*, if he claims the eſtate in the ſame thing, upon which the concluſion is made; as if a woman be ſeiſed of land in fee,

and be eſtopped, and afterwards ſhe takes huſband, and has iſſue, he ſhall be eſtopped alſo. *Aſſ.* 8. *p.* 33. *Bro. Abr. Tit.* Fines, 73. 21 *E.* 3. 3, 5.

Eſtoppel is reciprocal of both ſides; for he, that ſhall not be concluded by a record, or other matter of eſtoppel, ſhall not conclude another by it; and yet in our books the king eſtops the ſucceſſor from ſaying, that *M.* had nothing in the land, by reaſon that *M.* held of the king, and levied a fine to his predeceſſor *ſur conuſans de droit, come ceo que il ad de ſon done*, and though the king was a ſtranger to it and had nothing but the ſeignory out of the land, yet the king took advantage of this eſtoppel. *Quære* the reaſon of this caſe, for this ſeems to be the prerogative of the king, of which I ſhall not ſpeak; but otherwiſe it is in the caſe of a common perſon, as 22 *E.* 3. 17. and 40 *E.* 3. 30. are agreed, ſee 41 *E.* 3. by *Finch*, that a ſtranger ſhall be concluded by a fine levied *ſur conuſans de droit, come ceo que il ad de ſon done.*

The Twenty-ſecond Reading.

AVOIDANCE *of the* FINE.

IT is to be known that it is ſaid in one book, that a fine may be avoided in two manners, *viz.* either to ſay, *that the parties to the fine, nor any of them, at the time of levying the fine had nothing; nor had, either of them any thing, &c. but one* J. S. *whoſe eſtate he has*; or to confeſs and to avoid the fine; as to ſay, that *J. S.* was ſeiſed, till by

by the conuſor diſſeiſed, who levied the fine, *viz.* that *J. S.* entered, who enfeoffed him. 3 *H.* 7. 9. upon *Formedon* of a gift in tail by fine, *ne dona pas* is a good plea, an averment againſt the fine, and in avoidance of the fine. *By the court.* 38 *E.* 3. 3. *a.*

And it is to be obſerved, if one plead in avoidance of a fine, *That the parties to the fine nor any of them, &c.* the other in maintenance of the fine, need not to ſhew, that the parties had the eſtate, but he that pleads in avoidance of the fine, ought to conclude, *and of this he puts himſelf upon the country*; then he that maintained the fine ſhall not ſay more than *and the aforeſaid demandant does the like, &c.* and if he that pleads the Fine, can prove, that any of the parties to the fine had any thing, this is good enough for him.

And upon what has been ſaid it clearly appears, that if one pleads, *that the parties to the fine, &c. but one* J. S. *whoſe eſtate he has, &c.* the ſeiſin of *J. S.* is not traverſable; but he who pleads the fine, ought to maintain the fine as is aforeſaid. But ſee 32 *E.* 3. *Bro. Abr. Tit.* Replication, 63. If huſband

Perk. 5. *a.* quære; writ of error *wat brought by huſband and wife, upon a fine levied by them, the wife being within age, and prayed that the fine might be reverſed, and that the juſtices would adjudge her within age, or at full age. For by law, if ſhe arrive to full age pending the* writ of error *undiſcuſſed, ſhe has loſt her ſuit for ever; by which it appears, that if ſhe dies before judgment, or arrives at full age before her age tried, pending the writ, that ſhe is concluded for ever,* 50 E. 3. 6. *a. and alſo* 3 E. 4. 50. *and* 21 E. 3. 24. *in effect agree with the book aforeſaid. For the* writ of error *was brought to reverſe a fine levied by her during her nonage. And to the* ſcire facias ad audiendum errores, *the defendant caſt a protection, and yet the juſtices tried the age of the infant by inſpection, and did not reſpite it, till the protection was expired.*

and wife levy a fine, and the wife is never examined, this is a great offence and neglect in the juſtices; but this ſhall not avoid the fine; but if an infant levies a fine, this is error, and the fine ſhall therefore be reverſed; but it ought to be reverſed during his minority, or at leaſt to have his age inſpected and examined during his minority; and then, as it ſeems to me, though he ſhould arrive at full age before judgment given, or though he ſhould die before judgment, yet the fine ſhall be avoided afterwards.

If a married woman only, without her huſband, levies a fine executory; though the huſband continues in poſſeſſion during his life, and afterwards dies, yet this ſhall conclude the wife and her heirs; but if execution had been ſued, and afterwards the huſband had died, this had avoided the fine for ever.

If a man of non-ſane memory, or idiot of full age levies a fine, this ſhall conclude their heirs, and the fine ſhall not be reverſed.

If one born an alien levies a fine, the fine is good; but it ſhall not conclude the king after office found.

The Twenty-third Reading.

TRIAL.

AND it is to be known, that all points of law are triable by the juſtices, and all matters of fact, unleſs in ſpecial caſes, are triable by the country.

And

And *note*, that in ancient time there were ſix juſtices of both benches; ſo that if an inferior court commits any error, it ſhall be determined, and reverſed by other ſix. For as matters of fact ſhall be tried by twelve jurors, ſo points of law by twelve juſtices. But wager of law of non-ſummons in a *Precipe* was permitted by two hands, 98 *E.* 3. 10. *a.* and ſo it appears in our books, if one would wage his law in debt, the law will, that he ſhall bring with him twelve of his neighbours; who will ſwear, that they believe in their conſciences that he ſpeaks the truth.

One of the trials by our law is inſpection, and view; as if an infant levies a fine, or ſuffers a recovery by default, or acknowledges a reconuſance, he ſhall reverſe them during his minority, and his nonage ſhall be tried by inſpection and view of the juſtices, and not by the country.

Another trial is by proofs, and not by the juſtices, nor by the country; and this is when a woman brings a writ of *dower*, and the tenant ſays, that her huſband, of whoſe poſſeſſion ſhe demands the dower, is alive, this ſhall be tried by proofs, and he who produces the beſt proofs ſhall have judgment.

Another trial is by ſummoners, and viewers; as if a *Recovery*, or *Precipe* be pleaded, and the other ſays nothing compriſed within the record, this ſhall be tried by the ſummoners and viewers, and neither by the juſtices, nor by the country.

If any record be denied, this ſhall be tried by the record, and neither by the juſtices, nor by the country.

Not attached in *aſſiſe* ſhall be tried by examination of the bailiff, and not otherwiſe. 8 *H.* 4. 7. *a.* But if the bailiff is not preſent to be examined, the juſtices ſhall take the aſſiſe by the court, and the aſſiſe (as it ſeems to me) ought to enquire, whether he was attached, or not. 9 *H.* 4. 1. *b.*

All ſpiritual things, as the right of marriage, the right of tithes between ſpiritual perſons, the mode of profeſſions, inſtitutions, abilities of clerks, plenarty of churches, ſhall be tried by the biſhop, and certified by him.

Reſignation is triable by the certificate of the biſhop, and not by the country, for this is ſpiritual. 3 *H.* 4. 11. *b.* *Thirning.*

A TREA-

A TREATISE OF Bail and Mainprize.

CHAP. I.

Whereof Bail or Mainprize is derived.

THIS word Bail is (as I take it) derived of the *French* word *Bailer*, which ſignifieth to deliver, becauſe he that is bailed, is as it were delivered into the hands and cuſtody of thoſe that are his pledges and ſureties.

This word Mainprize is derived out of two *French* words, That is to ſay, main, which ſignifieth an hand, *&c.* Of this word, prize, which ſignifieth taken, becauſe he that is taken to mainprize, is as it were taken into their hands and cuſtody that be his ſureties.

CHAP. II. *The deſcription of Bail and Mainprize.*

BAIL or mainprize is when a man detained in priſon for any offence, for which he is bailable or mainprizable by law, is by a compleat judge or judges of that offence, upon ſufficient ſurety found for his appearance and yielding of his body delivered out of priſon.

This deſcription doth as well belong to the one as to the other: And yet I find ſome difference

ference between them in our books; and therefore for the more further, and more ſpecial underſtanding of the ſame, I think it convenient to note ſuch difference as appears in our books to be betwixt them.

CHAP. III. *The difference between Bail and Mainprize.*

FIRST, he that findeth bail doth find ſurety only to anſwer that ſpecial matter.

33 E. 3. Tit. Mainpr. But he that findeth mainprize, findeth ſurety to appear and anſwer unto that cauſe whereof he was impriſoned, and touching all other matters and cauſes that ſhall be objected againſt him.

Secondly, the pledges and ſurety of him that is delivered to bail, may impriſon him, whoſe ſurety they are: for chief juſtice *Stuard* in 33 *Edw.* 3. ſaid that they were his gaolers or keepers, and if they ſuffered him to eſcape, they ſhould anſwer for the ſame.

Thirdly, the etymology of either of them doth ſhew and manifeſt the difference betwixt them, for in the one the priſoner is delivered by the judge, judges, or courts into the hands, and as it were, into the priſon of the ſureties, for the words be, *is delivered on bail.* But in the other caſes the words be, that ſuch and ſuch a man *ſhould be taken* without any ſuch delivery made by the court, as in the other caſe.

Now foraſmuch as before it is ſaid, that bail or mainprize is, when a man detained in priſon for any offence, for which he is bailable or mainprizeable by law, *&c.* I think it expedient to ſhew what perſons detained in priſon, were bailable

bailable or mainprizeable by the Common laws of this realm: for I mean not to ſet down the recognizances for bail and mainprize, as well becauſe the ſame are common, as alſo for that my deſire is to treat of ſuch matters as are moſt material, as ſhortly and as compendiouſly as I can.

CHAP. IV. *What perſons are bailable or mainprizeable by the Common law.*

IT appeareth by a ſtatute made in the parliament holden at *Weſtminſter*, in the third of *Edward* 1. commonly called *Weſtm.* 1. *c.* 15. that it was greatly doubted at the Common law, what perſons were bailable or mainprizeable, in the preamble of the ſaid ſtatute. It is ſaid *pur ceo qui avant ces heures ne fuit determine certeinement queux gentes fuerint repleviſeable et queux non, &c.* That is to ſay, Becauſe before this time it was not certainly determined who were repleviſable to be delivered out of priſon, and who not: ſo that it ſeemeth thereby at the Common law at that time great diverſity of opinions was touching the ſame: yet do I find a certain rule ſet down before that time touching letting of priſoners to bail: for *Bracton*, who wrote in the end of the reign of *Hen.* 3. (for ſo it appeareth in his third book and laſt chapter) ſaith as followeth. *In omni vero injuria et tranſgreſſione contra pacem imo cum adjectione feloniæ, ſolet quilibet appellatus vel rectatus per pleg. dimitti, præterquam de morte hominis quocunque temp' donec impriſonatus doceat ſe eſſe immunem.* (That is to ſay) in every wrong and treſpaſs againſt the peace of the king, although the offence reach to felony, every

every one that is appealed or indicted is wont to be bailed (except only in the caſe of the death of a man,) at any time until he that is impriſoned ſhall perceive himſelf guilty by inqueſt.

F. N. B. 243. Edit. 1755. A man in execution upon a judgment given upon a falſe verdict, if he will bring an attaint; or a man in execution upon an erroneous judgment, if he will bring a writ of error: Or if a man accomptant having auditors aſſigned unto him in land; or in ſuch corporation which will allow his ally: Or if a man being taken in execution upon a ſtatute, and will ſue an *audita querela*, the party plaintiff ſhould have a ſpecial writ to let him to bail, upon ſufficient ſurety taken, as the caſe requireth.

But of theſe and ſuch like bailments, my purpoſe is not to diſcourſe, but only and principally of ſuch bailments as do concern matters of the crown. It appeareth by the rule of *Bracton*, That a man appealed and indicted of any matter of felony, (the death of a man only excepted) ought to be let to bail without mainprize, which rule as it is general, ſo it hath many limitations and exceptions, which ſhall the better appear and be made manifeſt, if we conſider what perſon or perſons are not bailable, or at the leaſt mainprizeable by the Common law of our kingdom.

CHAP. V. *What perſons are not bailable, or mainprizeable by law.*

FIRST a man indicted or impriſoned for treaſon, is not bailable or mainprizeable; the ſame (as I take it) of petty treaſon; as

where the wife killeth her huſband, the ſervant his maſter or miſtreſs, or ſuch like. A man indicted, appealed, or impriſoned for the death of a man, is in ſome caſe bailable, and in ſome not, and very requiſite it is to have the law known in theſe caſes.

Therefore if a man be indicted as principal of the death of a man, he is not to be bailed; but if he be indicted as acceſſary before or after, he is bailable. For as * *Bracton* ſaith, *When he is not bailable for the fact, he ſhall be freed by his bail for the force, until he ſhall be acquitted or convicted of the fact, becauſe where a fact is committed, there may be ſometimes force, but never force without a fact.* And yet it appeareth by a book caſe in 28 *Edward* 3. *fol.* 94. That if two parties be indicted, the one as principal, the other as acceſſary unto the death of a man, after the principal be attainted, (that is to ſay) have judgment of death, or be outlawed, the acceſſary ſhall not in any kind whatſoever, be bailable, which agreeth (in my judgment) with the ſaid opinion of *Bracton, videlicet, Until he ſhall be acquitted or convicted of the fact.* But all this is to be underſtood in caſe of judgment, at the ſuit of the king. For in an appeal of murder, or death of a man, the law altereth in ſome caſes.

And therefore in an appeal of murder, ſometimes the defendant hath been let unto bail, although he hath been appealed as principal, and ſometimes again bail hath been denied him, as plainly appeareth by our books.

Therefore it ſeemeth to reſt much in the diſcretion of the judge or judges of the court,

* Lib. 3. Tract. 2. c. 12. fol. 128. No. 13.

upon

upon due and mature conſideration had of the manner and circumſtances of the offence, whether in that caſe he is to be bailed or not, except (you will ſay) with the opinion and judgment of the book in 21 *Edw.* the fourth, That the appealer in that caſe being neither indicted before the coroner, nor otherwiſe, may be bailed; whereby it appeareth that if the appealer in that caſe had been indicted thereof, they would not in that caſe have bailed him, which ſeemeth to me (*ſine præjudicio melioris ſententiæ*) to be a very reaſonable and diſcreet opinion, and worthy to be followed. And therefore may all our former books which ſeem to be repugnant one to the other, be reconciled and ſtand well together.

In an appeal of a man againſt two, the one as principal, the other as acceſſary, albeit the principal attainted, the acceſſary may be let to bail: but otherwiſe it is in the caſe of judgments as is aforeſaid. Manſlaughter, a man indicted or appealed of manſlaughter may be bailed.

Rape. 44 E. 3. 38. A man indicted or appealed of rape, he may be bailed, yet was that no felony at the Common law, until the ſtatute of *Weſtm.* 2. *cap.* 34.

Burglary. 44 E. 3. 3. A man indicted for burglary may be bailed, and it appeareth by the book in 29 *Aſſ. p.* 44.

Robbery. A man indicted or appealed of robbery may be bailed.

Outlarie. A man outlawed and impriſoned may not be bailed. *Weſtm.* 1. *cap.* 15.

Acceſſary. A man indicted as acceſſary for receit of any perſon or perſons outlawed, or otherwiſe attainted

attainted of murder or felony, is not bailable.

He that is abjured the realm ought not to be bailed. *Abjured.* Weſtm. 1. cap. 15.

If a man be indicted, and doth become an approver, he ought not to be bailed. *Approver.* Weſtm. 1. cap. 130.

If a man commit felony, and be taken in the manner, he ought not to be bailed.

If a man be indicted and impriſoned for any felony whereof he is bailable, yet if he break the priſon, and after be taken again, he ought not to be bailed. *Priſonbreaker.* Weſtm. 1. cap. 13.

If a man be indicted of manſlaughter, robbery, rape, burglary, felony, or any other offence, whereof he is bailable; yet if he be an infamous and a notorious thief, and ſo openly and commonly eſteemed and taken, bail may be denied him. Weſtm. 1. cap. 15.

A man indicted of conſpiracy (that is to ſay) that he with others conſpired falſly to indict another of murder or felony, by means whereof he was indicted, and afterwards convicted, ſhall not be bailed. *Manucaption in the Regiſter conſpiracy.*

And this was the reſolution of all the judges upon the queſtion demanded by king *Edw.* 3. himſelf, as it appeareth by the book caſe. 27 *Aſſ. p.* 12.

For it appeareth by our books, that a man attainted upon conſpiracy at the ſuit of the king, *Auern le judgment per villanie*; or as another book termeth it, ſhall have a villanous judgment.

And that is, that the body of the party ſo offending ſhall be taken, his lands, tenements, goods, and chattels into the king's hands, his wife

wife and children thrown out of his houſe, that his houſes be thrown down, his meadows ploughed up, his woods ſubverted and extirpated, that he ſhall for ever be diſabled to give any teſtimony, or bear any witneſs; and as the book caſe is, 24 *E.* 3. 34. That he never preſume to approach near unto the king's court, *&c.* Such a precious regard the law hath for the life and ſafety of the innocent: and ſuch is the judgment of the Common law againſt thoſe that unjuſtly ſeek after the blood of the guiltleſs: A matter in my opinion though not directly pertinent to our purpoſe, yet not unworthy of knowledge and memory, which may as well put the judges as jurors in remembrance how dear in the eye of the law the life of a man is, and by their puniſhments how deeply they offend, that ſeek to condemn the guiltleſs, although their purpoſe doth not take effect.

But (to return to our purpoſe) if a man be appealed by an approver, and be of good and honeſt fame, he may be bailed, during the life of the approver.

If a man be indicted of any offence whereof he may be bailed, yet if after he be found guilty of the ſame, or otherwiſe be thereof convicted, he ſhall not be bailed: and that appeareth by *Bracton* in his ſecond book, chap. 5. where he ſaith, *Nec ſunt illi qui culpabiles inveniuntur per pleg' dimittendi:* That is to ſay, Neither are thoſe that are found guilty, to be let bail.

Weſtm. 1. cap. 15. *Burning of houſes.*

A man indicted for felony, burning of houſes, ought not to be let to bail.

A man

A man indicted for putting out of eyes, cutting out of tongues, may be bailed. *Putting out of eyes*, &c.

A man taken by certificate of the biſhop, by a writ *de excommunicato capiendo*, ought not to be bailed. *Weſtm.* 1. *cap.* 15. *Excom. cap.*

A man indicted, and found guilty of the death of a man by miſadventure, or by caſting of a ſtone over an houſe, and by chance killing a man, woman, or child, &c. is not bailable. 3 *Ed.* 3. *Tit.* Corone, 334. *Chance-medley.*

Like law it is, if a man indicted, be found guilty of the death of a man *ſe defendendo*, he is not by the law to be bailed, both which do agree with the rule of *Bracton*, for *inveniuntur culpabiles*. *Se defendendo.* 35 E. 3. 42.

A man indicted upon a penal ſtatute, which inflicteth any loſs of life or member, as in caſe of felony, or otherwiſe, any corporal puniſhment, or loſs of goods, or impriſonment, may be bailed upon ſufficient ſureties: except it be eſpecially provided, That the offender in ſuch caſes ſhall not be let to bail or mainprize. As for example, If a man be indicted of felony, publiſhing of any ſeditious books, &c. contrary to an act made in the 23 *Eliz.* he may be bailed; for the offence is made felony, and bail and mainprize not prohibited. *Penal ſtatute.* *Regula.* 23 Eliz. c. 2.

But on the other ſide, the ſtatute of *E.* 6. of foreſtallers doth for the firſt offence inflict two months impriſonment, without bail or mainprize, &c. in which caſe the party ſo offending cannot be bailed. 5 & 6 Edw. 6. c. 14.

So as whereſoever a ſtatute maketh any offence felony, or ſetteth down a corporal or pecuniary puniſhment for any offence, and doth not expreſly forbid the party to be bailed, in every

every ſuch caſe (the caſe put before for example) the party ſo offending, and being thereof indicted, may be bailed.

But foraſmuch as all that which hath been ſaid, doth extend to ſuch only as be indicted of record, or appealed of the ſaid offences, it is neceſſary to be underſtood, what perſons committed to priſon for any offence, or for ſuſpicion of the ſame, may before they be indicted, or appealed thereof, be let to bail, and what not.

CHAP. VI. *What perſons committed for any offence, or for ſuſpicion of the ſame, may either by the Common law, or by any ſtatute, before judgment or appeal brought, be let to bail or mainprize.*

IT may be collected by that which hath been ſaid out of **Bracton*, that a man committed to priſon for any felony, or ſuſpicion of felony, could not by the Common law be let to bail before indictment or appeal brought; for his words be, *But in every injury and treſpaſs againſt the peace of the king, even with the addition of felony, it is uſual to diſcharge on bail every one appealed or indicted:* ſo as it ſeemeth by him that is to let to bail, muſt either be *appellatus* or *rectatus:* Therefore it ſeemeth by the Common law, That a man impriſoned for felony before indictment, or appeal, (except it were by writ) could not be bailed. And with that opinion ſeemeth to concur that which is declared by the ſtatute of *Weſtm.* 2. *cap.* 15. where it is declared, that by the Common law, a man impriſoned by the command of the king, or his juſtices, cannot be replevied or bailed, and

*Lib. 3 tract. 2. c. 8. fol. 123. N°. 8.

and accordingly is the law taken in the book caſe 24 *E.* 3. 33. where a man for going ſecretly armed, in *Weſtminſter-hall* under his apparel, was committed to ward by the juſtices, and was denied bail or mainprize, and forfeited his armour: and that perſons impriſoned could not be bailed, is alſo proved by the ſtatute of 1 *R.* 3. *cap.* 3. where it is ſaid, *Inaſmuch as many perſons are arreſted and impriſoned for ſuſpicion of felony, ſometimes of malice*, &c. *and alſo kept in priſon without bail, or mainprize, to their great vexation and trouble*, &c. whereby it is that which was before collected out of the words of *Bracton*. But here it may be demanded what was the reaſon, for *That the law is more commended, when approved of by reaſon*. That juſtices of the peace might by the Common law bail a man indicted for felony, and appealed thereof, but could not bail a man impriſoned upon ſuſpicion of felony: whereupon might be anſwered, that juſtices of the peace could not bail a ſuſpected perſon of felony before judgment or appeal, for two cauſes.

Firſt, That no juſtice of peace (for with them I will only meddle in this treatiſe) is a judge of any ſuch perſon before indictment, or appeal brought, and therefore could not let him to bail or mainprize: for it were abſurd to ſay, and directly contrary to the etymology of the word, that he ſhould deliver any perſons to bail, that were not judges of the perſon of him that were to be bailed.

The ſecond reaſon is, for that juſtices of the peace are, before appeal brought or indictment, no judges of the cauſe wherefore he is impriſoned. And therefore doth it follow, that by

the Common law they could not let ſuch perſon or perſons to bail. But here ariſeth a ſecond queſtion as doubtful as the firſt, why juſtices of the peace are neither judges of the perſon, nor of the cauſe in the caſe aforeſaid, before indictment or appeal brought. This doubt is fully reſolved by the opinion of the whole court in 14 *H.* 8. 16. where it is ſaid, That a juſtice of peace is a judge of record, and therefore ought to proceed upon that thing which is judicially before him of record.

But in the caſe before indictment or appeal brought, neither the perſon, or the cauſe is of record, and therefore he could not before indictment proceed either with the perſon, or with the cauſe.

And for that very reaſon it is likewiſe agreed by the whole court in that caſe, that a juſtice of peace cannot make out a warrant to arreſt any man for ſuſpicion of felony, before he be thereof indicted; and yet it is there agreed, That he may make a warrant againſt one before any record thereof; and this doth nothing impugn that which hath been ſaid, *exceptio probat regulam*, if the juſtice of the peace ſhould ſtay the arreſting of ſuch perſons as would break the peace before they were certified thereof by matter of record, the breach of the peace ſhould never be prevented: for before it be broken, there cannot any record be made thereof, *&c.* Therefore in that caſe for that cauſe, the juſtice of the peace may lawfully make out his warrant, (as commonly is uſed) although there be thereof no record made, but then ſeeing by the order of the Common law juſtices of the peace could not bail

bail a perſon ſuſpected or impriſoned before indictment or appeal brought, it is very requiſite to underſtand what perſons committed to priſon, may before indictment or appeal be let to bail by juſtice of the peace, by any ſtatute now in force.

CHAP. VII. *What perſons committed to priſon before indictment or appeal, be bailable by juſtices of peace, by ſtatute now in force.*

AND firſt I take it, that the ſtatute that is principally in force for this matter, is the ſtatute of 1 & 2 *Phil. & Mar. cap.* 13. which ſtatute being long, I will not recite, but ſhortly will ſhew what perſons impriſoned before indictment or appeal, may be let to bail by juſtices of peace, and what not by force of that ſtatute, or of any other not repealed.

A man committed for treaſon, or for ſuſpicion of treaſon, cannot be bailed by juſtices of peace. *Treaſon.*

The ſame law is of petty treaſon. *Petty treaſon.*

If a man be ſuſpected of murder, and thereupon committed to priſon, he cannot be bailed by a juſtice of peace. *Murder.*

But if a queſtion may be made, whether in that caſe a man committed to priſon upon ſuſpicion to be acceſſary to murder, whether he before indictment may be let to bail by the juſtices of the peace, and I think (*without prejudice to a better opinion*) that he cannot be bailed by them by force of the ſaid ſtatute: for albeit after indictment he may be bailed, as is aforeſaid; yet me ſeemeth that the ſaid ſtatute doth not extend to make him bailable by the juſtices of peace before indictment: for the

words of the ſtatute be, "Any perſon or perſons arreſted for manſlaughter or felony;" under which words (as I take it) the meaning of the makers of the ſtatute, was not to include either murder, or acceſſary of the ſame. It appeared by the expreſs letter of the ſtatute, that a man committed to priſon for manſlaughter, or ſuſpicion of the ſame, may be bailed.

Manſlaughter.

But the doubt is, what offences be included within this word felony, within the meaning of the ſaid ſtatute: and therefore it is neceſſary to underſtand what is comprehended under the ſame.

Burning of houſes.

If a man be committed to priſon for the felonious burning of houſes, or for the ſuſpicion of the ſame, yet he ought not to be let to bail within that ſtatute.

Burglary.

But a man committed for burglary, or for ſuſpicion of the ſame, may as well before as after indictment be let to bail within the meaning of that ſtatute.

Breaker of priſon.

A man impriſoned for felony, or for ſuſpicion of the ſame, doth break priſon, and afterwards is apprehended for the ſame, and therefore committed to priſon, he is not to be bailed, neither before, or after indictment.

Robbery.

But a man committed to priſon for robbery, or for ſuſpicion of the ſame, may be let to bail, as well before, as after indictment.

A notorious thief.

And yet, he that is a notorious thief, and ſo commonly eſteemed, if he be impriſoned for any offence touching the crown, or for any matter of felony, is not bailable within the meaning of the ſaid ſtatute.

Rape.

A man impriſoned for a rape, or for ſuſpicion of the ſame, is bailable as well before indictment, as after, (as I take it.) A man

A man that is approved by an approver, except he be of good and honeſt fame, ought not to be bailed, during the life of the approver. *Appeal by an approver.*

A man impriſoned for being acceſſary to the reſcuing or abetting of any perſon outlawed, or otherwiſe attainted for murder or felony, is not bailable either before, or after indictment. *Acceſſary to a felony, attainted.*

A man impriſoned for putting out of eyes, or cutting out of tongues, or for ſuſpicion of the ſame is bailable (as I take it) as well before, as after indictment, by the juſtices of the peace, by force of the ſaid ſtatute. *Putting out of eyes*, &c. 5 H. 4. c. 5. 37 H. 8. c. 6. 22. & 23 C. 2. c. 1. *Hal. Hiſt. Pl. Cr.* 645.

If a man commit any offence whereof he is bailable, yet if he be taken with the manner, the juſtice of peace may deny him bail as well before as after indictment, for he is not bailable: contrarily, a man impriſoned for an offence by any penal ſtatute made felony, may be bailed by the juſtice of peace; except bail be expreſly prohibited by the ſame, as well before as after indictment. *Taken in the manner.*

As for example, it is propounded by the ſtatute of 3 *H.* 7. *cap.* 2. That if any maid or widow having lands, goods, or tenements, or being heir apparent to their anceſtors, be taken away contrary to their will, and after married to ſuch miſdoer, *&c.* or defiled, *&c.* that ſuch offence is felony.

Now if a man be impriſoned for ſuch an offence, or for ſuſpicion of the ſame, he is bailable by the juſtices of the peace, as well before as after indictment. *There are many ſuch caſes, all which to enumerate would be too much, but theſe are ſufficient for examples.*

A queſtion may be here demanded, whether the ſaid ſtatute of 1 & 2 *Phil. & Mar.* do extend to felons made by the ſtatute ſince the ſaid act: And I think without any doubt it doth; For (as I take it) that any perſon ſuſpected, or impriſoned for any felony, made by any act of parliament, either before, or ſince the ſaid act of 1 & 2 *Phil. & Mar.* may be let to bail by the juſtices of the peace, unleſs bail and mainprize be expreſly therein prohibited.

But ſeeing ſuch perſons as are bailable by the ſaid ſtatute of 1 & 2 *Phil. & Mar.* are to be ſet to bail by juſtices of the peace, upon ſufficient ſurety found, it is neceſſary to be underſtood, how many, and what juſtices are requiſite, and how many ſureties or pledges are required by the law, upon the letting of ſuch perſons let to bail.

CHAP. VIII. *How many and what juſtices of peace are requiſite, and how many pledges or ſureties are required by the law.*

THE juſtices of peace in open ſeſſions of the peace, whereof the one to be of the *Quorum*, both being preſent together, may out of the ſeſſions let any priſoner impriſoned to bail, which bailment in writing ſubſcribed, or aſſigned with their own hands, they ought to certify the next general gaol delivery to be holden within the ſame county. But if a man be indicted by proceſs, and impriſoned, &c. he may be let to bail by any juſtice of peace by the Common law.

It appeareth by *Bracton's* treatiſe of his third book, *cap.* 18. that at that time he that was

to

to be bailed, ought to have twelve *good and lawful men of the county*, &c. and ſo it appeareth by an ancient book called the diverſity of courts, *fol.* 116. *b.* that in ancient time he that would wage his law ſhould have twelve men with him: So as it ſeemeth, that all that time as well in wagers of law, as in caſe of bail. [The law is changed ſince that time;] there ought to be two pledges or mainprizes at the leaſt. For me ſeemeth that the words of the writ *Manucapt.* is a ſufficient proof thereof; for the words be, *And although he hath ſeveral times offered to you ſufficient mainpernors, who would be mainprize for him*, &c. ſo as there muſt be ſufficient manucaptors, and that cannot be unleſs there be two at the leaſt: And (as me ſeemeth) it may well be collected by the book in 33 *E.* 3. and 36 *E.* 3. for there it is ſaid, *They are his keepers, and ſhall anſwer for his eſcape*, but there may a queſtion ariſe, how often for one offence a man may be let to bail?

CHAP. IX. *How often for one offence a man may be let to bail.*

IF a man be impriſoned, indicted, or appealed for any offence, for the which he is bailable, and is accordingly let to bail, and afterwards make default, and doth not appear according to the condition of his bail and his mainprizer's recognizance, and afterwards is arreſted and apprehended again, in this caſe a juſtice of peace may deny him bail. And that the law ſhould be ſo, it is proved by the book caſe, 2 *H.* 4. *fol.* 24. by the opinion of all the

juſtices, where it is ſaid in the like caſe, *That he ſhall not be mainprized afterwards.*

But becauſe it may fall out, that to be let to bail, may be denied to him that is bailable by the law, it is good to ſee what remedy the law hath provided for the priſoner ſo detained in priſon, and refuſed to be let to bail.

CHAP. X. *What remedy a man in priſon, and bailable by the law, hath to be let to bail.*

HE that is impriſoned for any offence, whereof he is bailable by the law, may have a writ *of mainprize* directed to the ſheriff of the ſame county, that he ſhall take ſureties of him to appear, and to let him at large, which writ in divers forms, and in ſpecial caſes appeareth in the Regiſter.

*Lib. 3. tract. 2. c. 8. fol. 123. N°. 6.

It appeareth by * *Bracton*, that in his time there was a writ in uſe *de odio et Atia*, touching which the words be theſe, *But whereas it is unjuſt, that innocent perſons, ſuch as thoſe who are not criminal, ſhould be long ſhut up detained in priſon; therefore on the moving complaint of relations and friends, inquiſition is uſually made by favour of the lord the king, whether ſuch perſons impriſoned for the death of a man were guilty of that death, or not, and a writ for this inquiſition ought to be denied no one*, and there ſets down the words of the writ.

Now it is to be underſtood, that at that time when *Bracton* writ, and for a long time after, the ſheriff by writ or commiſſion to him directed, uſed to take inquiſitions and judgments of murder and felony, and to hold pleas of the crown, which afterwards being denied unto him by the

the ſtatute of 2 *E.* 3. *cap.* 4. as I take it, the writ *de odio et atia* hath loſt it's force.

But here a queſtion may be demanded, whether a man committing any offence upon the ſea, or within the juriſdiction of the admiralty, for which if the ſame had been committed upon the land, he might have been bailed, whether the commiſſioners of the admiralty may let him to bail or no, either before or after indictment?

CHAP. XI. *In what caſes the commiſſioners of the admiralty may let priſoners to bail, either before or after indictment.*

AND firſt I take it (*without any diſparagement to a better opinion*) that the commiſſioners of the admiralty cannot let to bail any perſons impriſoned for any offence, or for ſuſpicion of any offence committed upon the ſea, or within the juriſdiction of the admiralty, before the perſon ſo impriſoned be thereof indicted, although in that caſe if the felony or offence had been done upon the land, the party had been bailable: and I am induced to be of that opinion for the conſideration following.

Firſt it is to be agreed, that before the ſtatute 28 *H.* 8. *cap.* 15. (ſee 11 & 12 *Wil.* 3. *cap.* 7.) All murders, robberies, piracies, and other offences done upon the ſea, were determined by the civil law, which law was in that behalf found very defective: foraſmuch as by that law none of the ſaid offences ſo committed, could be puniſhed without the teſtimony of two competent witneſſes, or expreſs confeſſion of the party offending; and thoſe dangerous and deteſtable offences as well for the want of ſufficient teſtimony, (murder being

being the ſhadow of piracy) as alſo by reaſon of the perverſe and obdurate obſtinacy of the offender, (an incident inſeparable to the pirate, in not confeſſing his offence) he commonly went away without puniſhment. This miſchief was remedied by the ſtatute 28 *H.* 8. *cap.* 13. whereby it is provided, that all treaſon, felonies, robberies, murders, and confederacies after the ſaid act, be committed in or upon the ſea, *&c.* ſhall be enquired of, tried, heard, determined, and judged in ſuch ſhires and places of the realm, as ſhall be limited by the king's commiſſion, to hear and determine ſuch offences after the courſe of the law of this land, and as if the ſame offence had been committed upon the land within the ſame ſhire. Of this much I gather, that hereunto the offenders were not bailable, neither by the Common law, or by any ſtatute: for how could they be bailable by the Common law, when the offence was not determinable by the Common law: And I find no ſtatute that taketh away the trial of thoſe offences by the Civil law, until the ſtatute of 28 *H.* 8. which ſtatute doth not make any proviſion at all for letting the ſaid offenders to bail: Therefore I do conclude, that without any great doubt, (as it ſeemeth) ſuch offenders before indictment, were not bailable before the commiſſioners, nor by the Common law, nor by the ſtatute 28 *H.* 8. But it may be demanded, why the ſtatute of 1 *&* 2 *Phil. & Mar. c.* 13. ſhall not extend to thoſe commiſſioners alſo: for within the admirals juriſdiction they are alſo juſtices of peace. This queſtion is eaſily reſolved, as may appear to thoſe that will diligently peruſe the ſtatute:

ſtatute: for they ſhall eaſily ſee, that the ſtatute doth not extend to thoſe commiſſioners for the admiralty, but only to thoſe commiſſioners for the peace, for the body of the county, which as by divers other parts of the ſaid act, ſo doth it moſt plainly appear by that which is therein provided, *videlicet*, And in caſe any juſtice of peace, *&c.* ſhall offend, *&c.* That the juſtices of the gaol delivery for the ſhire, *&c.* where ſuch offences ſhall happen to be committed, ſhall for every ſuch offence ſet a fine, *&c.* whereby it is evident, that the ſaid ſtatute was meant only to extend to juſtices of peace within the body of the county.

But I take it, that after indictment, the commiſſioners of the admiralty may let to bail ſuch perſons as are bailable by the law: becauſe they being juſtices of record, are after indictment judges as well of the perſon offending, as of the offence itſelf; and therefore may deliver ſuch perſons ſo indicted *upon Bail*, as I take it.

And what perſons are bailable by the law, and what not, may appear by that which hath been ſaid before: this only I will obſerve in this place, that ſeeing murder is ſuch an incident to piracy, I think that the commiſſioners of the admiralty, may well deny ſuch perſons as are indicted of piracy, to be let to bail or mainprize, as well for the heinouſneſs of the offence, as for the affinity it hath with murder, the offenders wherein (as is aforeſaid) are not bailable.

CHAP.

CHAP. XII. *How, or in what ſort Bail or Mainprize may be diſcharged.*

IF the juſtice of peace do let any priſoner that is bailable to bail, and afterwards as well the Priſoner by a writ of *Habeas Corpus*, as the record of the indictment, be removed by a writ of *Certiorari*, either into the *Chancery*, or into the *King's Bench*, the bail or mainprize taken by the juſtice of peace is diſcharged for ever, as it is holden in 32 *H.* 8. *Tit.* Mainprize, yea although the record be remanded by a *Procedendo*, as it is there likewiſe holden. Maſter *Statham* doth report a caſe in 12 *R.* 2. That after indictment given in, *&c.* the mainprizers are diſcharged, and it is not holpen by the ſtatute of 1 *Ed.* 6. *cap.* 7. as I take it.

If the proceſs of any indictment be diſcontinued, the mainprizers are diſcharged, (as I take it) and if the party dieth, the mainprizers are diſcharged; for *mors omnia ſolvit, et impotentia excuſat legem*, as *Bracton* ſaith; but at the day of appearance the mainprizers cannot plead the death of the party, but upon proceſs againſt them it muſt come in, by the return of the ſheriff, as it is holden, and then alſo may the mainprizers plead the ſame, as I take it, in diſcharge of the recognizance; and of this matter thus much ſhall ſuffice.

CHAP.

CHAP. XIII. *The Concluſion with advertiſement.*

THE end and ſcope of this little treatiſe is, (under correction of thoſe of better judgment) to ſet forth what the law of the realm doth require touching bail and mainprize: A neceſſary thing (in my opinion) for ſuch as be juſtices of the peace to be known: for as he that ſtandeth upon plain and ſure ground, although he ſhould be borne by rage and tempeſt to the ground, yet might he without danger riſe of himſelf again: ſo he that hath the adminiſtration of juſtice, and in all his occaſions is guided and directed by the rule of the law, neither abuſing his authority, nor exceeding his commiſſion, ſtandeth on a ſure ground, which will bear him up at all ſeaſons. *A wiſe man thinks he may do only ſo much as is committed to his charge.* And good was the counſel (as thoſe that follow it find) whoſoever gave it, (*videlicet*) exceed not the commiſſion: And albeit it is truly ſaid, that *we muſt judge according to law, not to precedent:* And as the logician ſaith, *Examples demonſtrate, but do not prove*; yet undoubtedly it is a great contentment and ſatisfaction to an honeſt mind and a good conſcience, eſpecially in caſes that concern the life and liberty of a man, to follow the precedent of grave and reverend men: howbeit foraſmuch as all good laws are inſtituted, and made for the repelling of thoſe evils that moſt commonly happen: For *ad ea quæ frequentius accidunt jura adaptantur*, and principally do reſpect the general peace and profit of the people: and therefore we uſe to ſay, that a miſchief is rather

to

OLD TENURES.

Service de Chivaler.

TO hold by knights ſervice, is to hold by homage, fealty and eſcuage, and it draweth to it ward, marriage, and relief; and know thou that knight's ſervice is ſervice of lands or tenements to bear arms in war in the defence of the realm, and it oweth ward and marriage by reaſon that none is able nor of power, nor may have knowledge to bear arms, before that he be of the age of 21 years. And for ſo much that the lord ſhall not leaſe that, that of right he ought to have, and that the power of the realm nothing be made weak. The law will becauſe of his tender age, that the lord him ſhall have in his ward till the full age of him, that is to ſay 21 years.

Grand Serjeanty.

TO hold by grand ſerjeanty is as if a man hold certain lands or tenements of the king to go with him in his hoſt, or to bear his banner with him in his wars, or to lead his hoſt, or ſuch like, and thereto belongeth ward, marriage and relief, as it appeareth in the treatiſe of wards and reliefs in the ſtatute made 28 *Ed.* 1.

Petit Serjeanty.

TO hold by petit ſerjeanty is as if a man hold of the king land or tenements, yielding to him a knife, a buckler, an arrow, a bow without ſtring, or other like ſervice at the will of the firſt feoffor, and thereto belongeth not ward, marriage, or relief. And mark well that a man may not hold by grand, nor petit ſerjeanty, but of the king.

Eſcuage.

TO hold by eſcuage is by knights ſervice, and there belongeth ward, marriage, and relief. And mark well, that a man may not hold by eſcuage, but that he hold by homage, for that eſcuage of common right draweth to him homage, as it was judged *termino H.* 21 *E.* 3. *cap.* 42. *fol.* 52. *Avowrye*, 115. And note well, that eſcuage is a certain ſum of money, and it ought to be levied by the lord of his tenant after the quantity of his tenure, when eſcuage runneth thro' all *England.* And it is ordained by all the counſel of *England* how much every tenant ſhall give to his lord, and that is properly to maintain the wars between *England* and them of *Scotland*, or of *Wales*, and not between other lands, for that, that thoſe foreſaid lands ſhould be of right belonging to the realm of *England.*

Homage anceſtrel.

TO hold by homage anceſtrel is where I or my anceſtors have holden of you or of your anceſtors from time out of mind whereof no

mind

mind runneth, by homage, fealty, and certain rent. And it is not to hold by knight's ſervice, and thereto belongeth not ward, marriage, nor relief. And note well that homage may be ſaid in two manners, that is to ſay, homage anceſtrel, and homage *de fait*. Homage anceſtrel is where you or your anceſtors have holden of me and mine anceſtors during the time of man's remembrance, by homage, fealty, and rent. Homage *de fait* is where I enfeoff yourſelf to hold of me by homage and rent, and in ſo much that this homage beginneth by my deed, it is called homage *de fait*.

And note well that homage anceſtrel draweth near to him voucher, that is to ſay, warranty of anceſtors, but not homage *de fait*.

Curteſy of England.

TO hold by the curteſy of *England* is where a man taketh a wife, inheritrix, and they have iſſue a ſon or daughter, and the wife dieth, whether the iſſue be dead or alive, the huſband ſhall hold this land, for term of his life by the curteſy of *England*, and by the law. And in this caſe the fee and the right remaineth in the perſon of him of whom he holdeth: and for that, this tenant may not alien in fee, nor for term of another's life, and if he do, it is lawful to him in the reverſion to enter.

Fee-ſimple.

TO hold in fee-ſimple is to hold to any man or woman, to him and to his heirs and his aſſigns for ever.

Frank tenure.

TO hold in freehold is to hold for term of his own life, or for term of another man's life. And in this caſe the fee and the right remaineth in the perſon of him, of whom he holdeth. And for that this tenant may not alien in fee nor for term of life: And if he do, it is well lawful to him in whom the fee and the right abideth to enter.

Dower.

TO hold in dower is where a man inherit taketh a wife and dieth, the heir ſhall enter, and endow the wife of the third part of all that that was her huſband's in his life, in fee-ſimple or fee-tail, and ſhe ſhall hold theſe lands for term of her life as her freehold.

Terme d'ans.

TO hold for term of years is not but chattel in effect, for no action is maintainable againſt the termor, for the recovering of the freehold, for no freehold is in him. A leaſe for term of years is a chattel real, and the other chattel perſonal, and all goods which are removable are chattels perſonals.

Mortgage.

TO hold in mortgage is to hold for a certain term upon condition, that if the leſſor pay ſo much money at ſuch a day, that he may enter, and if not, that the other ſhall have a fee-ſimple or fee-tail, or freehold. And in every caſe where lands or tenements be given

to

a man for a certain term upon condition on the part of the leſſor to make the leſſee to have longer time or term, if the other do not as the condition is, the lands and tenements until the day that the condition ſhould be done, be holden in mortgage, as in a dead gage.

And note well, that if land be let to a man in mortgage in fee-ſimple or in fee-tail, upon condition, that if the firſt leſſor, as is before ſaid, pay ſo much money at ſuch a day that he may enter, and if not, that the leſſee have the ſame eſtate in the lands, that the leſſor did him grant at the beginning. And if before the day aſſigned, the leſſee be diſſeiſed, he ſhall have aſſiſe of novel diſſeiſin. And in caſe that if the leſſee take a wife and die ſeiſed before the day aſſigned, the woman ſhall be endowed.

And note well, that if the leſſor after the death of the leſſee pay not the money at the day aſſigned, then the woman ſhall hold her dower, and the iſſue his heritage. And in caſe the leſſor at the day aſſigned pay the money to the heir of the leſſee, then he may put out the woman and the heir alſo of all the land firſt let. And if a man give lands to another in tail, yielding to him a certain rent by the year, and one enter for default of payment, the donee taketh a wife and dieth ſeiſed, the woman ſhall be endowed. And in caſe that after the rent be behind, the donor may enter and put out the woman and the heir alſo. And note well, that if lands be let to a man in mortgage in fee upon condition, the leſſee doth alien, the leſſor ſhall be charged to pay the

money to the alienee, and not to the feoffee, as it is ſaid.

Burgage.

TO hold in Burgage, is to hold as if the burgeſs hold of the king, or of another lord lands or tenements, yielding to him a certain rent by the year, or elſe there where another man then burgeſs holdeth of any lord lands or tenements in burgage, yielding to him a certain rent by the year.

Socage.

TO hold in Socage is to hold of any lord lands or tenements, yielding to him a certain rent by the year for all manner of ſervices. And note well, that to hold by ſocage is not to hold by knight's ſervice, nor thereto belongeth ward, marriage, nor relief, but they ſhall double once their rent after the death of their anceſtors according to that which they be wont to pay to their lord. And they ſhall not be over meaſure grieved, as it appeareth in the treatiſe of wards and reliefs. And note well, that ſocage may be ſaid in three manners, that is to ſay, ſocage in free tenure, ſocage in ancient tenure, and ſocage in baſe tenure. Socage in free tenure is to hold freely by certain rent for all manner of ſervices, as is before ſaid, and that the next kins body ſhall have the ward to whom the heritage may not deſcend, till the age of 14 years, that is to ſay, if the heritage come by the part of the father, they of the part of the mother ſhall have the ward, and contrary wiſe.

And

And note well that if the guardian in ſocage do make waſte, he ſhall not be impeached of waſt, but he ſhall yield accompt to the heir when he ſhall come to his full age of xxi years. And look the ſtatute of *Marlebridge*, *c.* 17. for this matter.

Socage in ancient tenure is that where the people in ancient demeſne held, which uſe no other writ to have than the writ of right cloſe, which ſhall be determined according to the cuſtom of the manor, and the *monſtraverunt* to diſcharge them when their lord diſtraineth them to do other ſervice that they ought not to do. And this writ of *monſtraverunt* ought to be brought againſt the lord, and thoſe tenants hold all by one certain ſervice, and theſe be free tenants of ancient demeſne.

Socage in baſe tenure, is where a man holdeth in ancient demeſne, that may not have the *manſtraverunt*, and for that it is called the baſe tenure.

Fee ferm.

TO hold in fee ferm is to hold in fee-ſimple, yielding to the lord the value, or at leaſt the fourth part by the year, and he ought to do no other thing, but as it is contained in the feoffment, and he that holdeth in fee ferm ought to do fealty and not relief.

Frank fee.

TO hold in frank fee, is to hold in fee-ſimple lands pleadable at the Common law.

Baſe fee.

TO hold in fee baſe, is to hold at the will of the lord.

Villenage.

TO hold in pure villenage, is to do all that, which the lord will him command.

The definition of villenage is villain of blood, and of tenure. And it is he of whom the lord taketh redemption to marry his daughter, and to make him free, and it is he whom the lord may put out of his lands or tenements at his will, and alſo of all his goods and chattel. And note well, that a ſokeman is no pure villain, and a villain oweth neither ward, marriage, or relief, nor to do any other ſervices real. And note well, that the tenure in villenage ſhall make no free man villain, if it be not continued ſince time out of mind, nor villain land ſhall make no free man villain, nor free land ſhall make no villain free, except that the tenant have continued free ſince the time of no mind, but a villain ſhall make free land villain by ſeiſin or claim of the lord. And note well, that if a villain purchaſe certain land, and take a wife and alien, and dieth before the claim or ſeiſin of the lord, the wife ſhall be endowed. And note well, that in caſe that the lord bring a *Precipe quod reddat* againſt the alien which voucheth to warrant the iſſue of the villain which is villain to the lord, he ſhall have the voucher, and by proteſtation the lord may ſay that (notwithſtanding that he plead with his villain) yet his villain ſhall not be infranchiſed.

And

And note well, that a baſtard ſhall never be judged villain, but by knowledge in court of record. And note well, that if debt be due by a lord to a free man, and he maketh two men his executors the which be villains to the ſaid lord and dieth, the villains ſhall have an action of debt againſt their lord, notwithſtanding that he plead with them. And if he make proteſtation, they ſhall not be for ſo much infranchiſed, for that they be to recover the debt aforeſaid to the uſe of another perſon, that is to ſay, to the uſe of their teſtator, and not to their own uſe. And if the tenant in dower have a villain which purchaſeth certain land in fee, and after the tenant in dower entereth, ſhe ſhall have the land to her and to her heirs for evermore; and the ſame law is of tenant for term of years of a villain.

And note well, that the lord may rob his villain, beat and chaſtiſe at his will, ſave only that he may not maim him, for then he ſhall have appeal of maim againſt him.

And note well, that a villain may have 3 actions againſt his lord, that is to ſay, appeal of death of his anceſtor, appeal of rape done to his wife, and appeal of maim. And note well, if two parceners bring a writ of nieſe, and one of them be nonſuit, the nonſuit of him ſhall be judged the nonſuit of them both, ſo that if the nonſuit be after appearance, they ſhall be put out from that action for ever, for the law is ſuch in favour of liberty. And note well, if two have a villain in common, and one of them make to him a manumiſſion, he ſhall not be made free againſt both. And note well, that in a writ *de nativo habendo*, it behoveth

behoveth that the lord ſhew how he cometh privy of the blood of the villain of whom he is lord, *&c.* And if he nor none of his anceſtors were not ſeiſed of none of his blood, he ſhall not win by his action, if the villain have not knowledged in court of record himſelf to be his villain. And note well, that in a writ of nieſe may not be put more nieſes than two; and this was firſt brought in, in the hatred of bondage. But in a writ *de libertate probanda* may be put as many nieſes as the plaintiff will.

And note well, that if the villain of a lord be in ancient demeſne of the king, or other town privileged, within a year and a day, the lord may ſeiſe him; and if he dwell in the ſame town or other place franchiſed by a year and a day without ſeiſin of the lord, he hath no power to ſeiſe him after, if he go not in eſtray out of the foreſaid franchiſe.

Tail.

TO hold in tail is where a man holdeth certain lands or tenements to him and to his heirs of his body begotten. And note well, that if the land be given to a man and to his heirs males, and he has iſſue male, he hath fee-ſimple, and that was adjudged in the parliament of our lord the king. But where lands or tenements be given to a man and to his heirs males of his body begotten, then he hath fee-tail, and the iſſue female ſhall not be inheritable, as it appeareth the xiiiith year of *Ed.* 3. in Aſſiſe.

Tail after poſſibility.

TO hold in the tail after poſſibility of iſſue extinct, is where land is given to a man and to his wife, and to the heirs of their two bodies ingendred, and one of them overliveth the other without iſſue between them begotten, he ſhall hold the land for term of his own life, as tenant in the tail after poſſibility of iſſue extinct. And notwithſtanding that he do waſt, he ſhall never be impeached of that waſt. And note that if he alien, he in the reverſion ſhall not have a writ of entry *in conſimili caſu.* But he may enter, and his entry is lawful; *per Robert Thorpe,* Chief juſtice.

Free marriage.

TO hold in frank-marriage, is to hold in the ſecond tail limited in the ſtatute of *Weſtminſter* 2. *cap.* 1. And the feoffor ſhall acquit the feoffee of all manner of ſervices until the 4th degree be paſt, and the feoffor ſhall do all the ſervice and ſuits during the ſaid term. And after the heirs of the feoffee ſhall do it, for that the privity of blood is paſt. And if he be diſtrained for ſervice, he ſhall have a writ of meſne againſt him, ſuppoſing that he held the lands of him, but he ſhall not have the fore-judgment if it be not in advantage of his iſſues.

And note well, that after the fourth degree be paſt, he ſhall be attendant of as much ſervice to the donor, as the donor is attendant to the lord paramount. And if he do felony for which he is attaint, the king ſhall have his lands

lands for term of his life natural. And after his death, his iſſue ſhall inherit, as by force of the tail. And in this caſe, none ſhall have his lands by way of eſcheat; no more than in any other tail. And in caſe that the tenant die without heir of his body begotten, the land ſhall revert to the donor as it ſhould in the common tail. And if a man let his land to another in frank marriage, yielding to him a certain rent by year, he ſhall hold this land in the common tail, and not in frank marriage for by the rent reſerved, theſe words (*in liberum maritagium*) be all utterly void, ſo that the tenure ſhall be intended after the tenure in the common tail.

And note well, that the gift in frank marriage hath a condition annexed to it, notwithſtanding that it be not openly declared in the deed of the gift, as it appeareth by the ſtatute of *Weſtminſt.* 2. *cap.* 1. *de donis conditionalibus.*

And note well, that a man ſhall not give lands nor tenements in frank marriage, but where the woman is privy of blood to the donor, for elſe the man nor the woman ſhall have no other eſtate by the feoffment but for term of life.

Free alms.

TO hold in frank almoigne, is to hold lands or tenements to ſerve God and holy church, to endow without doing any other manner of ſervice. And note well, that in this caſe the donor is meſne, and ought to acquit him freely againſt the chief lord, and alſo they that hold in frank almoigne ſhall do no fealty, but they that hold in frank marriage, ſhall do fealty.

Elegit.

TO hold by *elegit* is where a man hath recovered debt or damage by a writ againſt another, or by confeſſion, or in other manner, he ſhall have within the year againſt him a writ judicial called *Elegit*, to have execution of the half of all his lands and chattels, (except oxen and beaſts of the plow) till the debt or damages be utterly levied or paid to him, and during the term he is tenant by *elegit*. And note well, if he be put out within the term he ſhall have aſſiſe of novel diſſeiſin, and after a rediſſeiſin if need be, and this is given by the ſtatute of *Weſtminſter* 2. *cap.* 18. and alſo by the equity of the ſame ſtatute, he that hath his eſtate, if he be put out, ſhall have aſſiſe, and a rediſſeiſin if need be; and alſo if he make his executors and die, and his executors enter and after be put out, they ſhall have by the equity of the ſame ſtatute ſuch action as he himſelf before-ſaid; but if he be put out, and after make his executors and die, his executors may enter, and if they be ſtopped of their entry, they ſhall have a writ of treſpaſs upon their matter and caſe.

And note well, if he do waſt in all the land, or parcel, the other ſhall have againſt him immediately a writ judicial out of the firſt record called a *venire facias ad computandum*, by which it ſhall be inquired if he have levied all the money, or parcel; and if he have not levied the money, then it ſhall be inquired to how much the waſt amounteth, and if the waſt amount but to parcel, then as much of the money, as the waſt amounteth ſhall be abridged

ridged of the foreſaid money which was to be levied. But if he have done more waſt than the foreſaid ſum of money which was to be levied amounteth, the other ſhall be diſcharged by-and-by of all the ſaid money, and ſhall recover the land, and for the ſuperfluity of the waſt made above that which amounteth to the ſaid ſum, he ſhall recover his damages ſingle; and the ſame law is of his executors, and alſo of him that hath his eſtate. And note, that if he alien in fee, for term of life, or in tail, all or parcel of the land which he holdeth by *elegit*, if the alienation be made within the term, or after, he which hath right ſhall have againſt him one aſſiſe of novel diſſeiſin. And they both muſt be put in the aſſiſe, the alienor and the alienee, and notwithſtanding that the alienor die preſently, yet he which hath right ſhall have an aſſiſe againſt the alienee alone, as if the alienor had been a plain tenant for term of years, and that is by the equity of the ſtatute of *W.* 2. *cap.* 25. for that that he hath not but a chattel in effect; and the ſame law is of his executors and of him which has his eſtate, as is aforeſaid.

And note well, that in an *elegit*, if the ſheriff return that he had nothing the day of the recognizance made, but that he purchaſed lands after the time, then the party plaintiff ſhall have a new writ to have execution thereof; the ſame law is of a ſtatute merchant. And note well, that after a *fieri facias* a man may have the *elegit*, but not contrary wiſe, inaſmuch as the *elegit* is of as higher nature then the *fieri facias*. And note well, that if a man recover by a writ of debt

debt and ſueth a *fieri facias*, and the ſheriff return that the party hath nothing whereof he may make gree with the party, then the plaintiff ſhall have a *capias ſicut alias*, and a *pluries*; and if the ſheriff return at the *capias mitto vobis corpus*, and he have nothing whereof he may make gree to the party, he ſhall be ſent to the priſon of the Fleet, and there ſhall abide till he have made agreement with the party; and if the ſheriff return *non eſt inventus*, then there ſhall go forth an exigent againſt him. And note well, that in a writ of debt brought againſt a perſon of holy church, which hath nothing of lay fee, and the ſheriff returneth, that he has nought by which he may be ſummoned, then ſhall the plaintiff ſue a writ to the biſhop that he make his clerk to come, and the biſhop ſhall make him to come by ſequeſtration of the church. And note well, that if a man bring a writ of debt and recover, and make his executors and dieth, they ſhall have execution, notwithſtanding that it be within the year by a *fieri facias*.

Statute merchant.

TO hold by Statute merchant, is where a man knowledgeth to pay certain money to another at a certain day before the mayor, bailiff, or other warden of any town, that hath power to make execution of the ſame ſtatute, and if the obligee pay not the debt at the day, and nothing of his goods, lands, or tenements may be found within the ward of the mayor or warden beforeſaid, but in other places without, then the recogniſee ſhall ſue the

the recogniſance and obligation with a certification to the chancery under the king's ſeal, and he ſhall have out of the chancery a *capias* to the ſheriff of the county where he is to take him and to put him in priſon, if he be not a clerk, till he have made agreement of the debt. And one quarter of the year after that, he ſhall be taken, he ſhall have his land delivered to himſelf to make agreement to the party of the debt, and he may ſell it while he is in priſon, and his ſale ſhall be good and lawful. And if he do not agree within a quarter of a year, or if it be returned that he be not found, then the recogniſee may have a writ of the chancery which is called *Extendi facias*, directed to all ſheriffs, where he hath lands, to extend his lands and goods, and to deliver the goods to him, and to ſeiſe him in his lands, to hold them to him and to his heirs and his aſſigns, till that the debt be levied or paid, and for that time he is tenant by ſtatute merchant. And note well, that in a ſtatute merchant the recogniſee ſhall have execution of all the lands which the recogniſor had the day of the recogniſance made, and any time after by force of the ſame ſtatute.

And note well, that when any waſte or deſtruction is made by the recogniſee, his executors, or by him that hath eſtate, the recogniſor or his executors ſhall have the ſame law as is before ſaid of the tenant by *elegit*.

And note well, if the tenant by ſtatute merchant hold over his term, he that hath right may ſue againſt him a *venire facias ad computandum*, or elſe enter by-and-by as upon tenant by *elegit*.

Rent

Rent Service.

THERE be three manners of rents, that is to ſay, Rent ſervice, Rent charge, and Rent ſeck. Rent ſervice is, where a man holdeth of another by fealty, and to do ſuit to his court, and yielding to him a certain rent by the year for all manner of ſervices.

And note well, that if the lord be ſeiſed of the ſervice and rent beforeſaid, and they be behind, and he diſtrain, and the tenant reſcueth the diſtreſs, he may have aſſiſe, or a writ of reſcous; but it is more neceſſary for him to have aſſiſe, than a writ of reſcous, for that by aſſiſe he ſhall recover his rent and his damages, but by a writ of reſcous he ſhall not recover but the thing and the damages.

And note well, that if the lord be not ſeiſed of the rent and ſervice, and they be behind, and he diſtrain for them, and the tenant take again the diſtreſs, he ſhall not have aſſiſe, but a writ of reſcous, and ſhall not need to ſhew his right.

And note well, that if the lord diſtrain his tenant in Socage for knight's ſervice, which is not denied him, and avow for the ſame ſervice in court of record, he ſhall be charged by the ſame ſervice; by *Finch, term. Hillarii, anno* 46.

And note well, that if the lord may not find a diſtreſs by two years, he ſhall have againſt tenant a writ of *ceſſavit per biennium*, as it appeareth by the ſtatute of *Weſtm.* 2. *cap.* 21. And if the tenant die in the mean time and his iſſue enter, the lord ſhall have againſt the iſſue a writ of entry upon the *Ceſſavit*; or if the

tenant alien, the lord ſhall have againſt the alienee the foreſaid writ. But if the lord have iſſue and die, and the tenant be in arrearages of the ſaid rent and ſervice in the time of the father of the iſſue, and not in the time of the iſſue, he may not diſtrain for the arrearages in the time of his father, and he ſhall have no other recovery againſt the tenant, or any other, for that ſuch advantage is given by the law to the tenant. And note well, that rent ſervice is that to the which belongeth fealty, but to rent charge and rent ſeck belongeth not fealty, but it belongeth to rent ſervice of common right.

Rent charge.

RENT charge is where a man granteth certain rent going out of his lands or tenements to another in fee-ſimple, or in fee-tail, or for term of life by deed, upon condition, that at what time the rent be behind, it ſhall be well and lawful to the grantee, his heirs or aſſigns to diſtrain in the ſame lands or tenements. And note well, that if the rent be behind, it is well lawful to the grantee at his election to have a writ of annuity, or elſe he may diſtrain; and if the diſtreſs be taken againſt his will from him, and he was never ſeiſed before, he hath no recovery, but by writ of Reſcous, for the diſtreſs firſt taken giveth not to him ſeiſin, only if he hap the rent before, for if he were ſeiſed of that rent before, and after the rent be behind, and he diſtrain, and reſcous to him be made, he ſhall have aſſiſe, or a writ of reſcous.

And

And note well, that in every aſſiſe of rent charge and annual rent, or in a writ of Annuity, it behoveth him that bringeth the writ to ſhew forth an eſpecialty, or elſe he ſhall not maintain the aſſiſe; but in a mortdauncestor or formedon in the diſcender, or other writs (in the which title is given or compriſed) brought of rent charge, or annual rent, it needeth not to ſhew eſpecialty.

And note well, that if a man grant a rent charge to another, and the grantee purchaſe the half of the land whereof the rent is going out, all the rent is extinct, and if the grantee releaſe to the grantor parcel of the rent, yet all the rent is not extinct.

But in rent ſervice the law is otherwiſe, for notwithſtanding that the lord hath purchaſed the half of the land whereof the rent is going out, yet the rent is not extinct but for the half, and the cauſe of the diverſity is, that rent ſervice may be ſevered to one portion, but not rent charge.

And note well, that if rent charge be granted to two jointly, and the one releaſe, yet the other ſhall have the half of the rent. And alſo if one purchaſe the half of the land whereof the rent is going out, the other ſhall have the half of the rent of his companion: and if the diſſeiſor charge the land to ſtranger, and the diſſeiſee bring an aſſiſe and recover, the charge is defeated. But if he that hath right charge the land, and a ſtranger fain a falſe action againſt him, and recover by default, the charge abideth. And note well, that in caſe that purparty be between the parceners, and more land be alloted to one than to the other,

and ſhe that hath more of the land, chargeth her land to the other, and ſhe happeth the rent, ſhe ſhall maintain aſſiſe without eſpecialty. And if the grantee have in fee-ſimple, or in fee-tail, and hath iſſue and dieth, if the iſſue bring a formedon, or aſſiſe of Mortdauncestor, he ſhall never be charged to ſhew an eſpecialty.

Rent ſeck.

RENT ſeck, is where a man holdeth of me by homage, fealty, and other ſervice, yielding to me a certain rent by the year, and I grant this rent to another, reſerving to me the ſervice.

And note well, that in rent ſeck, if a man be ſeiſed of the rent, and the rent be behind, he may not diſtrain, but he ſhall have aſſiſe of novel diſſeiſin.

And note well, that if rent ſeck be granted to a man and to his heirs, and the rent be behind, and the grantor die, the heir may not diſtrain, nor ſhall recover the arrearages of the time of his father, as it is before ſaid of rent ſervice.

And in the ſame manner it is to ſay of rent charge, or annual rent. But in all theſe rents beforeſaid the heir may have for the arrearages in his own time, ſuch advantage as his father had in his life.

And note well, that in rent ſeck if a man be not ſeiſed of the rent, and it be behind, he is without recovery, for that it was his own folly at the beginning when the rent was granted to him, or reſerved, that he took not ſeiſin of

of the rent as a penny or two pence. And note well, that a man may not have a *ceſſavit per biennium*, or another writ of entry *ſur ceſſavit* for no rent ſeck behind by two years, but only for rent ſervice, as it appeareth in the ſtatute.

And note well, that in rent ſeck it behoves him that ſueth for the rent ſeck to ſhew a deed to the tenant, for elſe the tenant ſhall not be charged with the rent but where the rent ſeck was rent ſervice before; as in that caſe: Lord, meſne, and tenant, and every of them holdeth of other by homage and fealty, and the tenant of the meſne 10*s.* of rent, the lord paramount purchaſeth the lands or tenements of the tenant, all the ſeignory of the meſne but the rent is extinct. And for this cauſe this rent is become rent ſeck, and the rent ſervice changed, for he may not diſtrain for this rent; and in this caſe he that demandeth the rent ſhall never be charged to ſhew a deed. Alſo in a writ of mortdaunceſtor, aiel, or beſail of rent ſeck, it needeth not to ſhew a ſpecialty, for that theſe writs of poſſeſſion do comprehend a title within themſelves, that is to ſay, that the anceſtor was ſeiſed of the ſame rent, and continued his poſſeſſion, becauſe of which ſeiſin the law ſuppoſeth that it is alſo averrable by the country. Yet learn, for ſome ſuppoſe that it behoveth of neceſſity to ſhew forth a deed, for that rent ſeck is a thing againſt common right, as well as rent charge. But in aſſiſe af novel diſſeiſin, and in a writ of *Entre ſur diſſeiſin* brought of rent ſeck, it behoveth of neceſſity to ſhew forth a deed, for that that rent ſeck is a thing againſt common right, except in the caſe beforeſaid, where it was rent

ſervice before. And aſſiſe of *novel diſſeiſin*, and a writ of *entre ſur diſſeiſin*, contain within them no title, but ſuppoſe a diſſeiſin to be done to the plaintiff, and of the entendment of the law, the diſſeiſin giveth no cauſe of averment againſt common right, but of neceſſity it behoveth to ſhew forth a deed.

Suit ſervice.

SUIT ſervice is to come to the court from 3 weeks to 3 weeks by the whole year, and for that a man ſhall be diſtrained and not amerced.

Suit real is to come to the court of leet, and that is but twcie in the year, and for that a man ſhall be amerced, and not diſtrained.

SOME

SOME

NOTES and ADDITIONS

TO THE

Lord COKE's COMMENTARY upon LITTLETON, ſhewing how the LAWS are altered ſince thoſe Authors wrote.

FOR if he is not tenant to the land, be he within or without the ſeignory, he is exempt from the ſervices claimed by reaſon of the land. *Folio* 1. *b.* [1]

By 32 *H.* 8. *c.* 16. It is enacted, That all leaſes of any dwelling houſe within this realm, or any the king's dominions, made to any ſtranger, artificer, or handicrafts men born out of the king's obeyſance, not being denizen, ſhall be void. *Folio* 2. *b.* [2.]

Per Vavaſor in 14 *H.* 7. 29. If no evidence is given, yet the jury ſhall give a verdict for one of the parties. *Folio* 6. *b.* [3]

Since my lord *Coke* wrote, another incapacity to inherit hath been introduced *per* 11 & 12 *W.* 3. *c.* 4. *ſect.* 4. by which it is enacted, That from and after the 29th of *September* 1700. If any perſon educated in the popiſh religion, *Folio* 8. *a.* [4]

ligion, or profeſſing the ſame, ſhall not, within ſix months after he or ſhe ſhall attain the age of eighteen years, take the oath of allegiance and ſupremacy, and alſo ſubſcribe the declaration ſet down and expreſſed in an act of parliament made 13 *C.* 2. intituled, *An Act for the more effectual preſerving the King's perſon and government, by diſabling papiſts from ſitting in either houſe of Parliament*, to be by him or her made, repeated and ſubſcribed in the courts of Chancery or King's Bench, or quarter-ſeſſions of the county where ſuch perſon ſhall reſide; every ſuch perſon ſhall in reſpect of him or herſelf only, and not to or in reſpect of any of his or her heirs or poſterity, be diſabled and made incapable to inherit or take by deſcent, deviſe or limitation, in poſſeſſion, reverſion or remainder, any lands, tenements or hereditaments within the kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*; and that during the life of ſuch perſon, or until he or ſhe do take the ſaid oaths, and make, repeat and ſubſcribe the ſaid declaration in manner as aforeſaid, the next of his or her kindred, which ſhall be a proteſtant, ſhall have and enjoy the ſaid lands, tenements and hereditaments, without being accountable for the profits by him or her received during ſuch enjoyment thereof, as aforeſaid: But in caſe of any wilful waſte committed on the ſaid lands, tenements, or hereditaments, by the perſon ſo having or enjoying the ſame, or any other by his or her licence or authority, the party diſabled, his or her executors and adminiſtrators ſhall and may *recover treble* damages for the ſame, againſt the perſon committing ſuch

ſuch waſte, his or her executors or adminiſtrators, by action of debt in any of his majeſty's courts of record at *Weſtminſter:* And that from and after the 10th day of *April* 1700. every papiſt, or perſon making profeſſion of the papiſh religion, ſhall be diſabled, and is hereby made incapable to purchaſe either in his or her own name, or in the name of any other perſon or perſons, to his or her uſe, or in truſt for him or her, any manors, lands, profits out of lands, tenements, rents, terms or hereditaments, within the kingdom of *England*, dominion of *Wales*, and town of *Berwick* upon *Tweed*, and that all and ſingular eſtates, terms, and any other intereſts or profits whatſoever out of lands, from and after the ſaid tenth day of *April*, to be made, ſuffered or done, to or for the uſe or behoof of any ſuch perſon or perſons, or upon any truſt or confidence, mediately or immediately, to or for the benefit or relief of any ſuch perſon or perſons, ſhall be utterly void and of none effect, to all intents, conſtructions and purpoſes whatſoever.

For till the ſon is born the remainder cannot veſt, and there is nothing to divide the eſtate for life from the inheritance, which for a time drowns the eſtate for life. *Folio* 28. *a.* [5]

This was originally true of all earldoms, *&c.* becauſe they were all held by feudal ſervice, which women could not do; but their nature being altered, this rule is now to be underſtood only of ſuch earldoms, *&c.* as remain in their original plight, and are ſtill feudal, as the earldom of *Arundel*, &c. *Salk.* 253. 3 *Lev.* 401. *Folio* 30. *b.* [6]

Folio 31.*a.* [7] The reaſon why the law gave the wife a dower, will appear if we conſider how the law ſtood antiently: for by the old law, if this proviſion had not been made, and the party at the marriage had made no aſſignment of dower, the wife would have been without any proviſion, for the perſonal eſtates even of the richeſt were then very inconſiderable; and before truſts were invented, which is but lately, the huſband could give his wife nothing during his own life, nor could he provide for her by will, becauſe lands could not be deviſed unleſs it was in ſome particular places by the cuſtom, till the ſtatute of *H.* 8.

Folio 32.*a* [8] In the firſt caſe there never was any lawful marriage, without which ſhe can have no title to dower; for the ſentence in the ſpiritual court does not void the marriage, but only declares that to be void that was ſo before; but in the divorce *à menſa et thoro*, there the marriage is allowed to be good and ſtill ſubſiſting.

Folio 32.*a.*[9] This is to be underſtood under this limitation, *viz.* if ſhe go off her huſband's lands; for if ſhe ſtay with the adulterer on them, it is no elopement, and ſhe ſhall be endowed. *F. N. B.* 150.

Folio 39. *a.* [10] The reaſon is, becauſe the guardian in chivalry loſing his military ſervices which his tenant was bound to do, by the infancy of the heir, the eſtate he gave in conſideration of thoſe ſervices, ought to remain to him till he has the ſervices for which he granted it, to defray the expences of hiring others for thoſe purpoſes.

Folio 41. *b.* [11] By the 29 *Car.* 2. *cap.* 3. *ſect.* 12. it is enacted, That any eſtate *pur autre vie* ſhall be deviſeable

deviſeable by a will in writing, ſigned by the party ſo deviſing the ſame, or by ſome other perſon in his preſence, and by his expreſs directions, atteſted and ſubſcribed in the preſence of the deviſor by three or more witneſſes. And if no ſuch deviſe thereof be made, the ſame ſhall be chargeable in the hands of the heir, if it ſhall come to him by reaſon of a ſpecial occupancy, as aſſets by diſcent, as in caſe of lands in fee-ſimple; and in caſe there be no ſpecial occupant thereof, it ſhall go to the executors or adminiſtrators of the party that had the eſtate thereof, by virtue of the grant, and ſhall be aſſets in their hands.

By the 12 *Car.* 2. *cap.* 24. *ſect.* 1. All fines for alienations, ſeizures and pardons for alienations are taken away. And by the ſixth ſection it is declared, That nothing in the ſaid act contained ſhall be conſtrued to take away any fines for alienations due by particular cuſtoms of particular manors and places, other than fines for alienations of lands or tenements, holden immediately of the king *in capite*. *Folio* 43. *b.* [12]

It ſeems this opinion of our author is to be underſtood under a limitation, *viz.* unleſs the rent be reſerved during the term; for ſuch reſervation was adjudged good on conſideration of this opinion in the caſe of *Sacheverell* and *Frogate*, which is reported in 2 *Saunders* 361. 1 *Ventris* 148. & 161. to declare the intent of the parties to be the rent that ſhould be paid during the leaſe, and that though the reſervation thereof was to the executors, adminiſtrators and aſſigns, yet the law would diſpoſe of it to the heir, which judgment ſeems highly reaſonable, becauſe the rent comes in lieu of the *Folio* 47. *a.* [13]

the land, and iſſues out of it, and that otherwiſe had deſcended to the heir.

Fol. 47. *a.* [14] By the 2d of *W. & M. Seſſ.* 1. *cap.* 5. it is enacted, That where any goods or chattels ſhall be diſtrained for any rent reſerved and due upon any demiſe, leaſe or contract whatſoever, and the tenant or owner of the goods ſo diſtrained ſhall not within five days next after ſuch diſtreſs taken, and notice thereof (with the cauſe of ſuch taking) left at the chief manſion-houſe, or other moſt notorious place on the premiſſes, charged with the rent diſtrained for, replevy the ſame, with ſufficient ſecurity to be given to the ſheriff according to law, That then in ſuch caſe, after ſuch diſtreſs and notice, as aforeſaid, and expiration of the ſaid five days, the perſon diſtraining ſhall and may, with the ſheriff or under-ſheriff of the county, or with the conſtable of the hundred, pariſh or place where ſuch diſtreſs ſhall be taken (who are thereby required to be aiding and aſſiſting therein) cauſe the goods and chattels ſo diſtrained to be appraiſed by two ſworn appraiſers, (whom ſuch ſheriff, under-ſheriff or conſtable, are thereby impowered to ſwear) to appraiſe the ſame truly, according to the beſt of their underſtandings; and after ſuch appraiſement ſhall and may lawfully ſell the goods and chattels ſo diſtrained, for the beſt price that can be gotten for the ſame, towards ſatisfaction of the rent for which the ſaid goods and chattels ſhall be diſtrained, and of the charges of ſuch diſtreſs, appraiſement and ſale, leaving the overplus (if any) in the hands of the ſaid ſheriff, under-ſheriff or conſtable, for the owner's uſe.

3. And

3. And that it ſhall and may be lawful to or for any perſon or perſons having rent arrear, and due upon any demiſe, leaſe or contract, to ſeize and ſecure any ſheaves or cocks of corn, or corn looſe, or in the ſtraw; horſes drawing a cart may be diſtrained for rent; and if a man riding on an horſe be damage feaſant, the horſe may be led to the pound with the man upon him. 1 *Sid.* 422, 440. Or hay lying or being in any barn or granary, or upon any hovel, ſtack, or rick, or otherwiſe upon any part of the land or ground charged with ſuch rent, and to lock up and detain the ſame in the place where the ſame ſhall be found, for or in the nature of a diſtreſs, until the ſame ſhall be replevied upon ſuch ſecurity to be given, as aforeſaid; and in default of replevying the ſame, as aforeſaid, within the time aforeſaid, to ſell the ſame, after ſuch appraiſement thereof to be made, ſo as nevertheleſs ſuch corn, grain, or hay, ſo diſtrained as aforeſaid, be not removed by the perſon or perſons diſtraining, to the damage of the owner thereof, out of the place where the ſame ſhall be found and ſeiſed, but be kept there (as impounded) until the ſame ſhall be replevied, or ſold in default of replevying the ſame within the time aforeſaid.

4. And it is further enacted, That upon any pound-breach, or reſcous of goods or chattels diſtrained for rent, the perſon or perſons grieved thereby ſhall, in a ſpecial action upon the caſe for the wrong thereby ſuſtained, recover his and their treble damages and coſts of ſuit againſt the offender or offenders, in any ſuch reſcous or pound-breach, any or either of them,

them, or againſt the owners of the goods diſtrained, in caſe the ſame be afterwards found to have come to his uſe or poſſeſſion.

5. But in caſe any ſuch diſtreſs and ſale, as aforeſaid, ſhall be made, by virtue or colour of that act for rent, pretended to be in arrear and due, where in truth no rent is in arrear or due to the perſon or perſons diſtraining; or to him or them in whoſe name or names, or right, ſuch diſtreſs ſhall be taken, as aforeſaid; that then the owner of ſuch goods or chattels diſtrained, and ſold as aforeſaid, his executors or adminiſtrators ſhall and may, by action of treſpaſs, or upon the caſe, to be brought againſt the perſon or perſons ſo diſtraining, any or either of them, his or their executors or adminiſtrators, recover double the value of the goods or chattels ſo diſtrained and ſold, together with full coſts of ſuit. *Per* 8 *Annæ*, *c.* 16. it is further enacted, That no goods or chattels whatſoever, lying or being in or upon any meſſuage, lands, or tenements which are or ſhall be leaſed for life or lives, term of years, at will, or otherwiſe, ſhall be liable to be taken by virtue of any execution, or any pretence whatſoever, unleſs the party, at whoſe ſuit the ſaid execution is ſued out, ſhall before the removal of ſuch goods from off the ſaid premiſſes, by virtue of ſuch execution or ſuch extent, pay to the landlord of the ſaid premiſſes, or his bailiff, all ſuch ſum or ſums of money, as are or ſhall be due for rent for the ſaid premiſſes at the time of the taking ſuch goods or chattels, by virtue of ſuch execution: Provided the ſaid arrears of rent do not amount to

more

more than one year's rent; and in caſe the ſaid arrears ſhall exceed one year's rent, then the ſaid party at whoſe ſuit ſuch execution is ſued out, paying his ſaid landlord, or his bailiff, one year's rent, may proceed to execute his judgment as he might have done before the making of that act; and the ſheriff or other officer is thereby impowered or required to levy and pay to the plaintiff, as well the money ſo paid for rent, as the execution-money.

And in caſe any leſſee for life or lives, term of years, at will, or otherwiſe, of meſſuages, lands, or tenements, upon the demiſe whereof any rents are or ſhall be reſerved or made payable, ſhall fraudulently or clandeſtinely convey or carry off or from ſuch demiſed premiſſes, his goods or chattels, with intent to prevent the landlord or leſſor from diſtraining the ſame for arrears of ſuch rent ſo reſerved as aforeſaid, it ſhall and may be lawful to and for ſuch leſſor or landlord, or any perſon or perſons by him for that purpoſe lawfully impowered, within the ſpace of five days next enſuing ſuch conveying away or carrying off ſuch goods or chattels, as aforeſaid, to take and ſeize ſuch goods and chattels where ever the ſame ſhall be found, as a diſtreſs for the ſaid arrears of ſuch rent, and the ſame to ſell or otherwiſe diſpoſe of in ſuch manner, as if the ſaid goods and chattels had actually been diſtrained by ſuch leſſor or landlord, in and upon ſuch demiſed premiſſes for ſuch arrears of rent; any law, cuſtom, or uſage to the contrary in any wiſe notwithſtanding.

But it is provided, That nothing in that act contained ſhall extend, or be conſtrued to extend

extend to empower ſuch leſſor or landlord to take or ſeize any goods or chattels, as a diſtreſs for arrears of rent, which ſhall be ſold *bona fide*, and for a valuable conſideration, before ſuch ſeizure made; any thing therein contained to the contrary notwithſtanding.

And it is enacted alſo, That it ſhall and may be lawful for any perſon or perſons having any rent in arrear, or due upon any leaſe or demiſe for life or lives, to bring an action or actions of debt for ſuch arrears of rent, in the ſame manner they might have done in caſe ſuch rent were reſerved upon a leaſe for years.

And it is further enacted and declared, That all diſtreſſes thereby impowered to be made as aforeſaid, ſhall be liable to ſuch ſales, and in ſuch manner, and the monies ariſing by ſuch ſales to be diſtributed in like manner as by the firſt mentioned act is in that behalf directed and appointed.

It is thereby further enacted, That it ſhall and may be lawful for any perſon or perſons having any rent in arrear, or due upon any leaſe for life or lives, or for years, or at will, ended or determined, to diſtrain for ſuch arrears, after the determination of the ſaid reſpective leaſes, in the ſame manner as they might have done if ſuch leaſe or leaſes had not been ended or determined.

Provided that ſuch diſtreſs be made within the ſpace of ſix calendar months after the determination of ſuch leaſe, and during the continuance of ſuch landlord's title or intereſt, and during the poſſeſſion of the tenant from whom ſuch arrear became due.

And

And there is a proviſion in the act, That nothing contained therein ſhall extend, or be conſtrued to extend, to let, hinder, or prejudice her majeſty, her heirs or ſucceſſors, in the levying, recovering, or ſeizing any debts, fines, penalties or forfeitures, that ſhall be due, payable or anſwerable to her majeſty, her heirs or ſucceſſors, but that it ſhall and may be lawful for her majeſty, her heirs and ſucceſſors, to levy, recover, and ſeize ſuch debts, fines, penalties and forfeitures, in the ſame manner as if that act had never been made; any thing therein contained to the contrary thereof in any wiſe notwithſtanding.

Per 29 *Car.* 2. *c.* 3. *ſect.* 1, *&* 2. it is enacted, That all leaſes, eſtates and intereſts of freehold, or terms of years, or any certain intereſt of, in or out of any meſſuages, manors, lands, tenements or hereditaments made or created by livery and ſeiſin only, or by parol, and not put in writing, and ſigned by the parties ſo making or creating the ſame, or their agents thereunto lawfully authorized in writing, ſhall have the force and effect of leaſes or eſtates at will only, and ſhall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any conſideration for making any ſuch parol leaſes or eſtates, or any former law or uſage to the contrary notwithſtanding. *Folio* 48. *a.* [15]

2. Except nevertheleſs all leaſes not exceeding the term of three years from the making thereof, whereupon the rent reſerved to the landlord during ſuch term, ſhall amount unto two third parts at the leaſt of the full improved value of the thing demiſed. And

moreover that no leaſes, eſtates, or intereſts, either of freehold or term of years, or any certain intereſt, not being copyhold or cuſtomary intereſt, of, in, to, or out of any meſſuages, manors, lands, tenements or hereditaments, ſhall be aſſigned, granted, or ſurrendered, unleſs it be by deed or note in writing, ſigned by the party ſo aſſigning, granting, or ſurrendering the ſame, or their agents thereunto lawfully authorized by writing, or by act or operation of law.

Per 4 *Anne*, *c.* 16. *ſect.* 15. after a recital, that it hath been doubted, whether ſince the making of the ſaid act of parliament, the declarations or creations of uſes, truſts or confidences of any fines or common recoveries manifeſted by deed made, after the levying or ſuffering of ſuch fines or recoveries, are good and effectual in law: It was therefore declared, That all declarations or creations of uſes, truſts or confidences of any fines or common recoveries of any lands, tenements or hereditaments manifeſted and proved, or which hereafter ſhall be manifeſted and proved by any deed already made, or hereafter to be made by the party, who is by law enabled to declare ſuch uſes or truſts, after the levying or ſuffering or any ſuch fines or recoveries, are and ſhall be as good and effectual in the law, as if the ſaid laſt mentioned act had not been made.

Folio 53. *b.* [16] There are but three actions on the caſe in our books for dilapidations, *viz.* two in 1 *Lutwyche* 116. but it don't appear by that book that the plaintiffs recovered in thoſe caſes, as it

it does by the other, which is reported in 3 *Levinz*, *pag.* 268.

The leſſor by law may enter at ſeaſonable times, to ſee whether any waſte be committed by the tenant, and if the leſſee hinder his entering for that purpoſe, it appears by *Cro. Jac.* 478. *S. C.* 2 *Roll. Rep.* 21. that the leſſor may bring an action on the caſe: It hath alſo been adjudged that an action on the caſe lies againſt tenant at will, or at ſufferance, for waſte, if his leſſor be himſelf only leſſee for years, becauſe then he is anſwerable to the firſt leſſor. *W. Jo.* 224. *S. C. Cro. Car.* 187. *Salk.* 19. But it ſeems to be ſtill a *Quære*, whether otherwiſe an Action on the caſe may be brought for waſte? It is ſaid in *Salkeld*'s reports, in the caſe cited above, that it cannot; but it appears by 3 *Levinz*, *p.* 130. that an action on the caſe was brought by one who had the remainder in fee, againſt tenant for life; and *Pemberton*, C. J. and *Levinz* were of opinion that the action did lie; *Wyndham* and *Charleton* differed; ſo no judgment was given. *Folio* 54. *b.* [17]

If an eſtate is let at will, reſerving rent payable at a certain day, the leſſee at will cannot determine the leaſe before or after the day of payment. 1 *Sid.* 339. *Folio* 55. *b.* [18]

Per 6 *An. cap.* 18. *ſect.* 5. it is enacted, That every perſon, who as guardian or truſtee for any infant, and every huſband ſeiſed in right of his wife only, and every other perſon having any eſtate determinable upon any life or lives, who after the determination of ſuch particular eſtates or intereſts, without the expreſs conſent of him, her, or them, who are, or ſhall be next, and immediately intitled, *Folio* 57. *b.* [19]

upon and after the determination of ſuch particular eſtates or intereſts, ſhall hold over and continue in poſſeſſion of any manors, meſſuages, lands, tenements, or hereditaments, ſhall be adjudged to be treſpaſſors; and that every perſon and perſons, his, her, and their executors and adminiſtrators, who are or ſhall be intitled to any ſuch manors, meſſuages, lands, tenements, or hereditaments, upon or after the determination of ſuch particular eſtates or intereſts, ſhall and may recover in damages againſt every ſuch perſon and perſons ſo holding over as aforeſaid, and againſt his, her, or their executors and adminiſtrators, the full value of the profits received during ſuch wrongful poſſeſſion, as aforeſaid.

Folio 59. *a.* [20] But a leaſe for one year is a good leaſe, and no forfeiture, and the leſſee may maintain an ejectment on it. 9 *Rep.* 75. *b.* 4 *Rep.* 26. *a.*

Folio 60. *a.* [21] Whether copyholds could be entailed, has been formerly doubted, but the law ſeems ſettled now according to the reſolution, That they may be entailed; and how ſuch eſtates-tail may be barred, ſee 2 *Saunders* 422. *Grantham* verſ. *Coply & al.*

Folio 64. *a.* [22] This tenure is taken away by 12 *Car.* 2. *c.* 24.

Folio 68. *b.* [23] This ſervice is by 12 *Car.* 2. *c.* 24. aboliſhed.

Folio 69. *a.* [24] *Quære* of this, for Mr. *Madox* in his hiſtory of the *Exchequer*, *p.* 431. has given very good reaſons to prove, that eſcuage is a ſervice incident to tenure by chivalry, and not a diſtinct tenure of itſelf.

Folio 72. *a.* [25] *Per* 4 *An. cap.* 16. *ſect.* 1. it is enacted, That when any demurrer ſhall be joined and entered

entered in any action or ſuit, in any court of record; the judges ſhall proceed and give judgment as the very right of the cauſe and matter in law ſhall appear unto them, not regarding any imperfection, omiſſion, or defect, in any writ, return, plaint, declaration, or other pleading, proceſs, or proceedings whatſoever, except thoſe only which the party demurring ſhall ſpecially and particularly ſet down and expreſs as cauſes of the ſame, notwithſtanding ſuch imperfection, *&c.* might heretofore be taken to be matter of ſubſtance, not aided by 27 *Eliz.* for furtherance of juſtice in caſes of demurrer and pleadings; ſo as ſufficient matter appear in the pleadings, upon which the court may give judgment according to the very right of the cauſe; and therefore no exception ſhall be taken for an immaterial traverſe, or default of entering pledges on any bill or declaration, or for default of alledging the bringing into court, any bond, bill, indenture, or other deed mentioned in the declaration, or other pleadings, or for default of alledging the bringing into court letters teſtamentary, or letters of adminiſtration, or for the omiſſion of *vi et armis et contra pacem*, or either of them; or for want of the averment of *hoc parat. eſt verificare*, or *hoc parat. eſt verificare per recordum*, or for nor alledging *prout patet per recordum*; but the court ſhall give judgment according to the very right of the cauſe, as aforeſaid, without regarding any ſuch imperfections, *&c.* or any other matter of like nature, except the ſame ſhall be ſpecially and particularly ſet down for cauſes of demurrer.

Folio 74. *a.* [16] This is to be intended of the time when *Bourdeaux* was part of the dominions of the crown of *England*. 2 *Roll. Abr.* 583. *pl.* 3.

Folio 74. *b.* [17] *Per* 12 *Car.* 2. *c.* 24. This tenure, with all its appendages of livery, wardſhip, *&c.* is taken away.

Folio 77. *a.* [18] This is to be underſtood of ſuch to whom the inheritance cannot deſcend.

Folio 87. *b.* [19] *Per* 12 *Car.* 2. *cap.* 24. *ſect.* 8, 9, *&* 10. it is enacted, That where any perſon hath, or ſhall have any child or children under the age of one and twenty years, and not married at the time of his death, That it ſhall and may be lawful, to and for the father of ſuch child or children, whether born at the time of the deceaſe of the father, or at that time in *ventre ſa mere*; or whether ſuch father be within the age of one and twenty years, or of full age, by his deed executed in his life-time, or by his laſt will and teſtament in writing, in the preſence of two or more credible witneſſes, in ſuch manner from time to time as he ſhall reſpectively think fit, to diſpoſe of the cuſtody or tuition of ſuch child or children, for and during ſuch time as he or they ſhall reſpectively remain under the age of one and twenty years, or any leſſer time, to any perſon or perſons in poſſeſſion or remainder, other than popiſh recuſants; and that ſuch diſpoſition of the cuſtody of ſuch child or children, ſhall be good and effectual againſt all and every perſon or perſons claiming the cuſtody or tuition of ſuch child or children, as guardian in ſocage, or otherwiſe; and that ſuch perſon or perſons, to whom the cuſtody of ſuch child or children ſhall be ſo diſpoſed or deviſed, as aforeſaid,

ſhall and may maintain an action of raviſhment of ward, or treſpaſs, againſt any perſon or perſons, which ſhall wrongfully take away or detain any ſuch child or children, for the recovery of ſuch child or children, and ſhall and may recover damages for the ſame in the ſaid action, for the uſe and benefit of ſuch child or children.

And that ſuch perſon or perſons, to whom the cuſtody of ſuch child or children hath been, or ſhall be diſpoſed or deviſed, ſhall and may take into his or their cuſtody, to the uſe of ſuch child or children, the profits of all lands, tenements and hereditaments of ſuch child or children, and alſo the cuſtody, tuition, and management of the goods, chattels, and perſonal eſtate of ſuch child or children, till their reſpective age of one and twenty years, or any leſſer time, according to ſuch diſpoſition aforeſaid, and may bring ſuch action or actions in relation thereunto, as by law a guardian in common ſocage might do.

But it is provided, That this act ſhall not extend to alter or prejudice the cuſtom of the city of *London*, nor of any other city or town corporate, or of the town of *Berwick* upon Tweed, concerning orphans, nor to diſcharge any apprentice from his apprenticeſhip.

The law ſeems to be now otherwiſe underſtood, *viz.* That the bailee ſhall not anſwer for accidents, if he was not in any fault. See *Mich.* 21 *E.* 4. 55. 4 *E.* 3. *fol.* 6. *pl.* 11. 29 *Aſſ. pl.* 28. *H.* 2. *H.* 7. *pag.* 111 *pl.* 9. *Palmer* 548. *Williams* verſ. *Hyde & Ux. S. C. W. Jones* 179. *Doctor & Student* 268. *Grotius*

Folio 89. *a.* [30]

tius de jure belli et pacis, lib. 2. *c.* 10. *ſect.* 3. *c.* 10, 12. *ſect.* 13. *Puffendorf de jure naturæ et gentium, lib.* 5. *cap.* 4. *ſect.* 6 *et* 7. and *Les loix civiles dans leur ordre naturel, Lib.* 1. *Tit.* 5. *ſect.* 2. *Tit.* 6. *ſect.* 3. *Tit.* 7. *ſect.* 3.

Folio 90. *b.* [31] It is enacted *per* 4 *An. cap.* 16. *ſect.* 27. That actions of account ſhall, and may be brought and maintained againſt the executors or adminiſtrators of every guardian, bailiff, and receiver: And alſo by one jointenant and tenant in common, his executors and adminiſtrators, againſt the other, as bailiff, for receiving more than comes to his juſt ſhare or proportion, and againſt the executor and adminiſtrator of ſuch jontenant or tenant in common. And the auditors, appointed by the court where ſuch action ſhall be depending, ſhall be, and are thereby impowered to adminiſter an oath, and examine the parties touching the matters in queſtion, and for their pains and trouble in auditing and taking ſuch account, ſhall have ſuch allowance as the court ſhall adjudge to be reaſonable, to be paid by the party on whoſe ſide the balance of the account ſhall appear to be.

Folio 98. *a.* [32] Becauſe the ſecular perſons, to whom they aliened, could not perform the divine ſervice.

Folio 98. *b.* [33] This is altered *per* 7 *&* 8 *W.* 3. *c.* 37. by which it is enacted, That it ſhall and may be lawful to and for the king, and for his heirs and ſucceſſors, when and as often as, and in ſuch caſes as his majeſty, his heirs or ſucceſſors ſhall think fit to grant to any perſon or perſons, bodies politick, or corporate, their heirs and ſucceſſors, licence to alien in mort-

main,

main, and alſo to purchaſe, acquire, take and hold in mortmain, in perpetuity or otherwiſe, any lands, tenements, rents or hereditaments whatſoever, of whomſoever the ſame ſhall be holden.

2. And it is thereby declared, That lands, tenements, rents or hereditaments ſo aliened, or acquired and licenſed, ſhall not be ſubject to any forfeiture, for or by reaſon of ſuch alienation or acquiſition.

This tenure is taken away by 12 *Car.* 2. *c.* 24. *Folio* 100. *b.* [34]

That the word tenant *in capite* imports no more than immediate tenant; and that it may be predicated of tenants by knight's ſervice, and tenant in ſocage, and of a common perſon's tenant, as well as of the king's, ſee proved to a demonſtration in Mr. *Madox's Hiſtory of the Exchequer*, *p.* 432. *Folio* 108. *a.* [35]

Theſe tenures being taken away *per* 12 *Car.* 2. *c.* 24. all lands are now deviſable, but in deviſes the forms preſcribed *per* 29 *Car.* 2. *c.* 3. *ſect.* 5 & 6. muſt be obſerved: By that ſtatute it is enacted, That all deviſes and bequeſts of any lands or tenements deviſable either by force of the ſtatute of wills, or by that ſtatute, or by force of the cuſtom of *Kent*, or the cuſtom of any borough, or any other particular cuſtom, ſhall be in writing, and ſigned by the party ſo deviſing the ſame, or by ſome other perſon in his preſence, and by his expreſs directions, and ſhall be atteſted and ſubſcribed in the preſence of the ſaid deviſor by three or more credible witneſſes, or elſe they ſhall be utterly void and of none effect. *Folio* 111. *b.* [36]

6. And

6. And moreover no deviſe in writing of lands, tenements or hereditaments, or any clauſe thereof, ſhall be revocable otherwiſe than by ſome other will or codicil in writing, or other writing declaring the ſame, or by burning, cancelling, tearing or obliterating the ſame by the teſtator himſelf, or in his preſence, and by his directions and conſent; but all deviſes and bequeſts of lands and tenements ſhall remain and continue in force until the ſame be burned, cancelled, torn, or obliterated by the teſtator or his directions in manner aforeſaid, or unleſs the ſame be altered by ſome other will or codicil in writing, or other writing of the deviſor ſigned in the preſence of three or four credible witneſſes, declaring the ſame; any former law or uſage to the contrary notwithſtanding.

Folio 112. *b.* [37] This is commonly true, but if the ſecond will cannot he found, and the contents of it are unknown, it is no revocation of the former. *Shower*'s caſes in parliament 146.

Folio 115. *a.* [38] The law is much altered *per* 21 *Jac.* 1. *c.* 16. which is as follows. All writs of *Formedon in Diſcender*, *Formedon in Remainder*, or *Formedon in Reverter*, of any manors, lands, tenements or other hereditaments whatſoever, ſhall be ſued and taken within twenty years next after the title, or cauſe of action, firſt deſcended or fallen, and at no time after the ſaid twenty years. And no perſon or perſons ſhall make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title which ſhall firſt deſcend or accrue to the ſame; and in default thereof, ſuch perſon ſo not entring, and their heirs, ſhall be utterly excluded and diſabled from ſuch entry after

ter to be made; any former law or ſtatute to the contrary notwithſtanding.

Provided nevertheleſs, That if any perſon or perſons, that is or ſhall be intitled to ſuch writ or writs, or that hath or ſhall have ſuch right or title of entry, be or ſhall be at the time of the ſaid right or title firſt deſcended, accrued, come or fallen, within the age of one and twenty years, feme covert, *Non compos mentis*, impriſoned or beyond the ſeas; that then ſuch perſon and perſons, and his and their heir and heirs ſhall or may, notwithſtanding the ſaid twenty years be expired, bring his action, or make his entry as he might have done before this act. So as ſuch perſon and perſons, or his and their heir and heirs, ſhall within ten years next after his and their full age, diſcoverture, coming of ſound mind, enlargement out of priſon, or coming into this realm, or death, take benefit of, and ſue forth the ſame, and at no time after the ſaid ten years.

3. And it is further enacted, That all actions of treſpaſs *Quare clauſum fregit*, all actions of treſpaſs, detinue, actions for trover and replevin for taking away of goods and cattle; all actions of account, and upon the caſe, other than ſuch accounts as concern the merchandize between merchant and merchant, their factors or ſervants; all actions of debt grounded upon any lending or contract without ſpecialty; all actions of debt for arrearages of rent, and all actions of aſſault, menace, battery, wounding and imprisonment, or any of them, which ſhall be

be ſued or brought, ſhall be commenced and ſued within the time and limitation hereafter expreſſed, and not after; (that is to ſay) the ſaid actions upon the caſe other than for ſlander; and the ſaid actions of account, and the ſaid actions for treſpaſs, debt, detinue and replevin for goods or cattle, and the ſaid actions of treſpaſs *Quare clauſum fregit*, within ſix years next after the cauſe of ſuch actions of ſuit, and not after; and the ſaid actions of treſpaſs, of aſſault, battery, wounding, impriſonment, or any of them, within four years after the cauſe of ſuch actions or ſuit, and not after; and the ſaid action upon the caſe for words within two years next after the words ſpoken, and not after.

4. But if in any of the ſaid actions or ſuits judgment be given for the plaintiff, and the ſame be reverſed by error; or a verdict paſs for the plaintiff, and upon matter alledged in arreſt of judgment, the judgment be given againſt the plaintiff that he take nothing by his plaint, writ, or bill; or if any the ſaid actions ſhall be brought by the original, and the defendant therein be outlawed, and ſhall after reverſe the outlawry, that in all ſuch caſes the party plaintiff, his heirs, executors or adminiſtrators, as the caſe ſhall require, may commence a new action or ſuit from time to time within a year after ſuch judgment reverſed, or ſuch judgment given againſt the plaintiff, or outlawry reverſed, and not after.

5. And

5. And be it further enacted, That in all actions of treſpaſs *Quare clauſum fregit*, hereafter to be brought, wherein the defendant or defendants ſhall diſclaim in his or their plea, to make any title or claim to the land, in which the treſpaſs is by the declaration ſuppoſed to be done; and the treſpaſs be by negligence or involuntary; the defendant or defendants ſhall be admitted to plead a diſclaimer; and that the treſpaſs was by negligence or involuntary, and a tender or offer of ſufficient amends for ſuch treſpaſs before the action brought; whereupon, or upon ſome of them, the plaintiff or plaintiffs ſhall be enforced to join iſſue; and if the ſaid iſſue be found for the defendant or defendants, or the plaintiff or plaintiffs ſhall be nonſuited, the plaintiff or plaintiffs ſhall be clearly barred from the ſaid action or actions, and all other ſuit concerning the ſame.

6. And it is further enacted, That in all actions upon the caſe for ſlanderous words, to be ſued or proſecuted by any perſon or perſons in any the courts of record at *Weſtminſter*, or in any court whatſoever that hath power to hold plea of the ſame; if the jury upon the trial of the iſſue in ſuch action, or the jury that ſhall enquire of the damages, do find or aſſeſs the damages under forty ſhillings, then the plaintiff or plaintiffs in ſuch action ſhall have and recover only ſo much coſts, as the damages ſo given or aſſeſſed amount unto, without any further increaſe of the ſame; any law, ſtatute, cuſtom or uſage to the contrary in any wiſe notwithſtanding.

7. Pro-

7. Provided nevertheleſs, That if any perſon or perſons, that is or ſhall be intitled to any ſuch action of treſpaſs, detinue, action *for* trover, replevin, actions of account, actions of debt, actions of treſpaſs, for aſſault, menace, battery, wounding or impriſonment, actions upon the caſe for words, be or ſhall be, at the time of any ſuch cauſe of action given or accrued, fallen or come, within the age of 21 years, feme covert, *non compos mentis*, impriſoned or beyond the ſea; that then ſuch perſon or perſons ſhall be at liberty to bring the ſame actions, ſo as they take the ſame within ſuch times as before limited after their coming to or being of full age, diſcovert, of ſane memory, at large and returned from beyond the ſeas, as by other perſons having no ſuch impediment ſhould be done.

Per 4 *Anne*, *c.* 16. *ſect.* 17 *&* 18. 'tis enacted, That all ſuits and actions in the court of admiralty for ſeamens wages, which ſhall become due, ſhall be commenced and ſued within ſix years next after the cauſe of ſuch ſuits or actions ſhall accrue, and not after.

18. Provided nevertheleſs, That if any perſon or perſons, who is or ſhall be entitled to any ſuch ſuit or action for ſeamens wages, be or ſhall be, at the time of any ſuch cauſe of ſuit or action accrued, fallen or come within the age of 21 years, feme covert, *non compos mentis*, impriſoned or beyond the ſeas; that then ſuch perſon or perſons ſhall be at liberty to bring the ſame actions, ſo as they take the ſame within ſix years next after their coming to or being of full age, diſcovert, of ſane memory, at large, and returned from beyond the ſeas.

19. And

19. And 'tis further enacted, That if any perſon or perſons againſt whom there is or ſhall be any ſuch cauſe of ſuit or action for ſeamen's wages, or againſt whom there ſhall be any cauſe of action, of treſpaſs, detinue, action *ſur* trover or replevin, for taking away any goods or cattle, or of actions of account, or upon the caſe, or of debt grounded upon any lending or contract without the ſpecialty of debt, for arrearages of rent, or aſſault, menace, battery, wounding and impriſonment, or any of them, be or ſhall be at the time of any ſuch cauſe of ſuit or action given or accrued, fallen or come, beyond the ſeas: That then ſuch perſon or perſons who is or ſhall be intitled to any ſuch ſuit or action, ſhall be at liberty to bring the ſaid actions againſt ſuch perſon and perſons after their return from beyond the ſeas, within ſuch times as are reſpectively limited for the bringing the ſaid actions before by the ſaid act, and by the ſaid other act made in the one and twentieth year of the reign of king *James* the firſt.

How the law ſtood as to *Non obſtantes* formerly, may be ſeen more at large in *Vaughan's Reports*, *page* 380. but at this day 'tis otherwiſe, for *per* 1 *W. & M. ſeſſ.* 2. *c.* 2. in the famous bill of right 'tis declared, that the ſuſpending of laws, or the execution of laws by the regal authority is illegal; and that the power of diſpenſing with laws by regal authority, as it had then lately been aſſumed and exerciſed, was illegal. *Folio* 120. a. [39]

As to the buſineſs of ſimony there have been two late acts concerning this matter, which are too material to be here omitted; the firſt was in

in the firſt year of *W. & M.* and makes the ſixteenth chapter of the firſt ſeſſions of that parliament in our ſtatute book, and runs thus: After the death of the perſon ſimoniacally promoted, the offence or contract of ſimony ſhall neither by way of title in pleading, or in evidence to a jury, or otherwiſe, hereafter be alledged or pleaded to the prejudice of any other patron innocent of ſimony, or of his clerk by him preſented or promoted, upon pretence of lapſe to the crown, metropolitan, or otherwiſe; unleſs the perſon ſimoniac or ſimoniacally preſented, or his patron was convicted of ſuch offence at the common law, or ſome eccleſiaſtical court in the life-time of the perſon ſimoniac, ſimoniacally promoted or preſented; any law or ſtatute to the contrary notwithſtanding.

3. And that no leaſe or leaſes really and *bona fide* made, or to be made by any ſuch perſon as aforeſaid, ſimoniac or ſimoniacally promoted to any deanry, prebendary or parſonage, or other eccleſiaſtical benefice or dignity, for good and valuable conſideration, to any tenant or perſon not being privy unto, or having notice of ſuch ſimony, ſhall be impeached or avoided for or by reaſon of ſuch ſimony, but ſhall be good and effectual in law, the ſaid ſimony notwithſtanding.

And *per* 12 *Annæ*, *ſt.* 2. *c.* 12. it is further enacted, That if any perſon, from and after the twenty-ninth day of *September* one thouſand ſeven hundred and fourteen, ſhall or do for any ſum of money, reward, gift, profit or advantage, directly or indirectly, or for or by reaſon of any promiſe, agreement, grant, bond, covenant

covenant or other aſſurance, of or for any ſum of money, reward, gift, profit or benefit whatſoever, directly or indirectly, in his own name, or in the name of any other perſon or perſons, take, procure, or accept the next avoidance of, or preſentation to any benefice with cure of ſouls, dignity, prebend, or living eccleſiaſtical, and ſhall be preſented or collated thereupon; that then every ſuch preſentation or collation, and every admiſſion, inſtitution, inveſtiture and induction upon the ſame, ſhall be utterly void, fruſtrate and of no effect in law, and ſuch agreement ſhall be deemed and taken to be a ſimoniacal contract; and that it ſhall and may be lawful to and for the queen's majeſty, her heirs and ſucceſſors, to preſent or collate unto, or give or beſtow every ſuch benefice, dignity, prebend, or living eccleſiaſtical for that one time or turn only; and the perſon ſo corruptly taking, procuring or accepting any ſuch benefice, dignity, prebend or living, ſhall thereupon and from thenceforth be adjudged a diſabled perſon in law to have and enjoy the ſame benefice, dignity, prebend, or living eccleſiaſtical, and ſhall alſo be ſubject to ſuch puniſhment, pain or penalty limited, preſcribed or inflicted by the laws eccleſiaſtical, in like manner, as if ſuch corrupt agreement had been made after ſuch benefice, dignity, prebend or living eccleſiaſtical had become vacant; any law or ſtatute to the contrary in any wiſe notwithſtanding.

Becauſe the title to the hundred is not in queſtion, but whether the leet be incident to the hundred. *Folio* 121. *a.* [40.]

For the teſtator had in him at the time of his death a right, tho' not to the poſſeſſion of the *Folio* 121 *b.* [41.]

damages, and had he lived they had been recovered by him, and they come in lieu and compenſation of a diminution of his perſonal eſtate.

Folio 125. *a.* [42.] This was formerly a learning of the greateſt nicety and uſe, but it is now of very little import ſince *per* 4 *Annæ*, *c.* 16. *ſect.* 6 & 7. it is enacted, That every *Venire facias* for the trial of any iſſue in any action or ſuit in any of her majeſty's courts of records at *Weſtminſter*, ſhall be awarded of the body of the proper county where ſuch iſſue is triable; but by the ſaid ſtatute it is provided, That this clauſe ſhall not extend to any writ, declaration, or ſuit of appeal of felony or murder, or to any indictment or preſentment of treaſon, felony, or murder, or other matter, or to any proceſs upon any of them, or to any writ, bill, action or information upon any penal ſtatute.

Folio 126. *a.* [43.] For if the replication ſhould be, That he had ſomething in the land, it would prove a jeofail, becauſe he might be leſſee at will; and ſuch leſſees have ſome intereſt, though it is not ſufficient to make the leaſe by which the rent muſt be claimed. *Cro. Jac.* 312.

Folio 127. *a.* [44.] *Per* 22 & 23 *Car.* 2. *cap.* 1. *ſect.* 7 & 8. it is enacted, That if any perſon or perſons, on purpoſe and of malice forethought, and by lying in wait, ſhall unlawfully cut out, or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip; or cut off or diſable any limb or member of any ſubject of his majeſty, with intention in ſo doing to maim or diſfigure in any the manners before-mentioned ſuch his majeſty's ſubjects: That then and in every ſuch caſe the perſon or perſons ſo offending, their coun-

counſellors, aiders and abettors (knowing of, or privy to the offence as aforeſaid) ſhall be and are thereby declared to be felons, and ſhall ſuffer death as in caſes of felony without benefit of clergy.

8. Provided that no attainder of ſuch felony ſhall extend to corrupt the blood, or forfeit the dower of the wife, or the lands, goods or chattels of the offender.

When our author wrote, theſe pleas might be pleaded as other pleas, but now it is ſince enacted *per* 4 *Annæ*, *cap.* 16. *ſect.* 11. That no dilatory plea ſhall be received in any court of record, unleſs the party offering ſuch plea, does by affidavit prove the truth thereof, or ſhew ſome probable matter to the court to induce them to believe that the fact of ſuch dilatory plea is true. *Folio* 128. *a.* [45]

This is to be underſtood under a limitation; for the child of a natural-born ſubject, who went abroad to merchandize, though born beyond ſea, is born a denizen, and ſhall be heir unto him. *Cro. Car.* 601. *Folio* 129. *a.* [46]

There are ſeveral late acts for the naturalizing perſons, (viz.) 9 & 10 *W.* 3. *cap.* 20. 11 *W.* 3. *c.* 6. 7 *Annæ*, *c.* 5. moſt of which was repealed *per* 10 *Annæ*, *c.* 5. but they are too long to be here inſerted.

This is to be underſtood of thoſe acts in which *Ireland* is not named. *Folio* 141. *b.* [47]

For by the treſpaſs the property is (though wrongfully) veſted in the treſpaſſor; but by a diſtreſs the property is not altered, but remains in the firſt owner; the goods diſtrained being only in the nature of a pledge, and the tenant on paying the rent is to have them again. *Folio* 145. *b.* [48]

Folio 145. *b.* [49] In 1 *Lev.* 90. it is ſaid, That this is to be underſtood of the county-courts, but not of the courts of *Weſtminſter-Hall.*

Folio 150. *b.* [50] The reaſon here given by our author is to be underſtood of ſeveral diſtreſſes for one and the ſame rent; for if two diſtinct rents are iſſuing out of the land, the tenant will be ſubject to two ſeveral diſtreſſes.

Folio 161. *a.* [51] For in this caſe the damage ceaſes, but in the other the rent remains due.

Folio 169. *a.* [52] *Quære*, Whether ſuch grant would be good now, becauſe of the ſtatute of 29 *Car.* 2. *cap.* 3. and ſee how the law ſtands now as to partitions. 8 & 9 *W.* 3. *cap.* 31.

Folio 199. *b.* [54] This is now altered *per* 4 *Annæ*, *c.* 16. See *ſupra* number 31.

Folio 202. *a.* [55] Yet the rent is not due till the laſt minute of the natural day; for if the leſſor dies after ſunſet and before midnight, the rent ſhall go to the heir, and not to the executors. 1 *Saund.* 287. *Salk.* 578.

Folio 208. *a.* [56] And if at the time of the feoffment a purer or more weighty money were current, and before the day of payment, coin of a baſer allay is eſtabliſhed by proclamation, a tender of the ſum in that coin is good. *Dav. Rep.* 18.

Folio 212. *b.* [57] It hath been formerly doubted, Whether the defendant in ſuch a caſe ought not to plead ſpecially? *See* 1 *Cro.* 142. *S. C.* 1 *Ander.* 198. *S. C. Mo.* 267. *S. C. Ow.* 45. *Savil* 96. 1 *Leon.* 311. but now this point is ſettled; for *per* 4 *Annæ*, *cap.* 16. *ſect.* 12. if the obligor, his heirs, executors and adminiſtrators have, before the action brought, paid to the obligee, his executors or adminiſtrators, the principal and intereſt due by the condition of the bond,

tho' ſuch payment was not ſtrictly made, according to the condition, yet it may be pleaded in bar of ſuch action, and ſhall be as effectual a bar thereof as if the money had been paid at the day and place, according to condition, and had been ſo pleaded.

Becauſe the acceptance of rent cannot make a new leaſe, and the old one was determined; but the acceptance of the rent is a ſufficient declaration that it is the leſſor's will to continue the leaſe, for he is not intitled to the rent but by the leaſe. *Folio* 215. *a.* [58]

Attornment being taken away *per* 4 & 5 *Anne*, *c.* 16. the law ſeems to be otherwiſe now. *Folio* 215. *a.* [59]

For 'till entry it doth not appear, the feoffor having power at his election to void or continue the eſtate of the feoffee, which he will do. *Folio* 218. *b.* [60]

And upon a contingency, (*viz.*) if he ſurvive. *Folio* 221. *b.*

It is to be preſumed, that an interlining, if the contrary is not proved, was made at the time of the making of the deed. 1 *Keb.* 21. [61] *Folio* 255. *b.* [62]

And if they cannot agree, they muſt be carried after the judges in carts till they do. 1 *Ven.* 97. *Folio* 237. *b.* [63]

But after, tho' the jury find the deed not to be the deed of the party, yet will not the court on motion detain the ſame, but will order it to be delivered to the party that brought it into court. *Vide Salkeld* 215. *Folio* 251. *b.* [64]

And ſo are the donees and feoffees of the diſſeiſor, for they come in by title, though 'tis a defeaſible one. *Folio* 238. *a.* [65]

This is to be underſtood under ſome limitation; for if the huſband be out of the four ſeas, during all the time of the wife's going with child, the child is a baſtard; but if he were at all within the time, it is to be preſumed legiti- *Folio* 244. *a.* [66]

of payment he becomes a bankrupt, he ſhall be diſcharged of the debt in the ſame manner as if the money had been payable before the bankrupcy; for it was *debitum in præſenti*, tho' it was *ſolvend' in future*.

Folio 298. *a.* [77] But all remainders, which were to commence on a future contingency, fell to the ground, if the particular eſtate, which ſupported them, determined before the contingency happened, till *per* 10 & 11 *W.* 3. *c.* 16. it was enacted, That where any eſtate, that then was or ſhall hereafter by any marriage, or other ſettlement, be limited in remainder, to or for the uſe of the firſt, or other ſon or ſons of the body of any perſon lawfully begotten, with any remainder or remainders over, to or to the uſe of any other perſons, or in remainder to or to the uſe of a daughter or daughters lawfully begotten, with any remainder or remainders to any other perſon or perſons, That any ſon or ſons, or daughter or daughters of ſuch perſon or perſons lawfully begotten, or to be begotten, that ſhall be born after the deceaſe of his, her, or their father, ſhall and may, by virtue of ſuch ſettlement, take ſuch eſtate ſo limited to the firſt and other ſons, or to the daughter or daughters, in the ſame manner as if born in the life-time of his, her, or their father, although there ſhall happen no eſtate to be limited to truſtees after the deceaſe of the father, to preſerve the contingent remainder to ſuch after-born ſon or ſons, daughter or daughters, until he, ſhe, or they, come *in eſſe*, or are born to take the ſame; any law or uſage to the contrary in any wiſe notwithſtanding.

This

This is altered *per* 4 *Annæ*, *cap.* 16. *ſect.* 4 & 5. by which it is enacted, That it ſhall and [78] may be lawful for any defendant or tenant, in any action or ſuit, or for any plaintiff in replevin, in any court of record, with the leave of the ſame court, to plead as many ſeveral matters thereto as he ſhall think neceſſary for his defence; but 'tis thereby alſo provided, That if any ſuch matter, upon a demurrer joined, be judged inſufficient, coſts ſhall be given at the diſcretion of the court; or if a verdict ſhall be found upon any iſſue in the ſaid cauſe, for plaintiff, or the defendant, coſts ſhall alſo be given in like manner, unleſs the judge who tried the ſaid iſſue ſhall certify that the ſaid defendant, or tenant, or plaintiff in replevin, had a probable cauſe to plead ſuch matter which upon the ſaid iſſue ſhall be found againſt him. *Folio* 303. *a.*

And then it does, becauſe the plaintiff cannot diſcern what to anſwer to in his replication. [79] *Folio* 303. *b.*

Per 4 *Annæ*, *c.* 16. *ſect.* 9. It is enacted, That all grants or conveyances thereafter to be [80] made by fine, or otherwiſe, of any manors or rents, or of the reverſion or remainder of any meſſuages or lands, ſhall be good and effectual to all intents and purpoſes, without any attornment of the tenants of any ſuch manors, or of the lands out of which ſuch rent ſhall be iſſuing, or of the particular tenants upon whoſe particular eſtates any ſuch reverſions or remainders, ſhall and may be expectant or depending, as if their attornment had been made. *Folio* 309. *a.*

10. Provided nevertheleſs, That no ſuch tenant ſhall be prejudiced or damaged by payment of any rent to any ſuch grantor or conuſor, or by breach of any condition for non-payment

ment of rent, before notice ſhall be given to him of ſuch grant by the conuſee or grantee.

Folio 316. *a.* [81] Theſe words *done en tail ou*, which viſibly corrupt the ſenſe of our author, though they are inſerted in all the editions of this book, and the old edition of *Littleton's* tenures printed at *London* by *Richard Pynſon*, are however to be omitted, for they are not in the original edition that was printed at *Roban*.

Folio 338. *a.* [82] For the firſt leaſe and the ſecond cannot ſubſiſt together, and the parties by making a new contract of as high a nature for the ſame thing, tacitly conſented to diſſolve the former, for without the diſſolution of that, the leſſor could not grant to the leſſee that intereſt in the land which was already paſt from the leſſor to the leſſee by the firſt leaſe.

Folio 344. *b.* [83] *Per* 7 *Annæ*, *c.* 18. It is enacted, That no uſurpation upon any avoidance in any church, vicarage, or any other eccleſiaſtical promotion, ſhall diſplace the eſtate or intereſt of any perſon entitled to the advowſon or patronage thereof, or turn it to a right, but he or ſhe, that would have had a right if no uſurpation had been, may preſent or maintain his or her *Quare impedit* upon the next, or any other avoidance (if diſturbed) notwithſtanding ſuch uſurpation; and if coparceners or jointenants, or tenants in common, be ſeiſed of any eſtate of inheritance in the advowſon of any church or vicarage, or other eccleſiaſtical promotion, and a partition is or ſhall be made between them to preſent by turns, That thereupon every one ſhall be taken and adjudged to be ſeiſed of his or her ſeparate part of the advowſon, to preſent in his or her turn; as if there be two, and

they make ſuch partition, each ſhall be ſaid to be ſeiſed, the one of the one moiety to preſent in the firſt turn, the other of the other moiety to preſent in the ſecond turn: In like manner if there be three, four, or more, every one ſhall be ſaid to be ſeiſed of his or her part, and to preſent in his or her turn.

This ſeems to be altered by the afore cited ſtatute. *Folio* 349. *b.* [84]

But that ſhall go to the adminiſtrator *de bonis non*; for ſhould they go to the huſband, the creditors, legatees, *&c.* of the deceaſed would be thereby wronged. *Folio* 351. *b.* [85]

The reaſons why eſtoppels are allowed ſeem to be theſe; no man ought to alledge any thing but the truth for his defence, and what he hath alledged once, is to be preſumed true, and therefore he ought not to contradict it, for as it is ſaid *in the 4th Inſtitute* 207. *Allegans contraria non eſt audiend'*. *Folio* 352. *a.* [86]

2*dly*, The law cannot be known 'till the facts are aſcertained; ſo neither can the truth of them be found out, but by evidence, and therefore it is reaſonable that ſome evidence ſhould be allowed to be of ſo high and concluſive a nature, as to admit of no contradictory proof.

This is to be underſtood of an acquittance under hand and ſeal, which is an eſtoppel, for if it be not under ſeal, the law will admit of proof to the contrary: But an Avowry for the laſt day's rent is no diſcharge for the former, for by the avowry the avowant ſays ſo much is due, but diſcharges nothing, no other rent being mentioned in the avowry, but that for which he acknowledges the taking the goods. See 1 *Sid.* 44. 1 *Lev.* 43. 1 *Saund.* 285, 286. *Lutw.* 1173. *Folio* 373. *a.* [87]

How-

Folio 373. *b.* [98] However it hath been effected in our days, for *per* 4 *Annæ*, *c.* 16. *ſect.* 21. All warranties ſince the firſt day of *Trinity*-term *Anno Dom.* 1705. by any tenant for life, of any lands, tenements, or hereditaments, coming or deſcending to any perſon in reverſion or remainder, are void and of no effect, and all collateral warranties made ſince then, of any lands, tenements, or hereditaments, by any anceſtor, who had no eſtate of inheritance in poſſeſſion, the ſame is void againſt the heir.

Folio 380. *b.* [89] Since our author wrote the law ſeems to be otherwiſe underſtood, for it is now the common practice for infants, having obtained a privy ſeal for that purpoſe, to ſuffer common recoveries, and the law ſeems to have been ſo ſettled ever ſince *Blunt*'s caſe, which is reported in *Hobart's Reports*, *pag.* 196. which recovery was afterward held good on a writ of error brought, and infancy aſſigned for error, as may be ſeen in *W. Jones* 318. *Cro. Car.* 307. where the caſe is reported under the names of the Earl of *Newport*, v. Sir *Henry Mildmay*. See *Salk.* 567.

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